

2002

T H E
D E C I S I O N S
O F

The Court of Session,

F R O M

Its first Institution to the present Time.

Abridged, and Digested under proper HEADS,

In Form of a DICTIONARY.

*Collected from a great Number of MANUSCRIPTS, never before
published, as well as from the printed DECISIONS.*

V O L. II.

E D I N B U R G H:

Printed by RICHARD WATKINS, One of His Majesty's Printers, for
himself, ALEXANDER KINCAID and ROBERT FLEMING. Sold
by the said *Alexander Kincaid*, at his Shop above the Cross.

MDCCXLI.

THE
DECISIONS

OF
THE COURT OF SESSION

FROM
ITS FIRST INSTITUTION TO THE PRESENT TIME

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VOLUME II

EDWARD M. C. H.

Printed by RICHARD WATKINS, One of His Majesty's Printers,
in the Strand, near the Theatre Royal, and by ROBERT F. LEITCH,
by the said Alexander Kincaid, at the Edinburgh Press.

MDCCLXXII.

A

T A B L E

O F T H E

Several TITLES, with their DI- VISIONS.

N.

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of the T I T L E S.

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A T A B L E

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A T A B L E

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Nautæ, Caupones, Stabularii.



VINTNER in a town, tho' no innkeeper, found to be in the case of the edict. Fountainhall, 17th February 1687, Master of Forbes *contra* Steil. --- As also householders in a town, who set rooms to lodgers. Fountainhall, 5th July 1694, May *contra* Wingat.

In a pursuit upon the edict *Nautæ, caupones, stabularii, &c.* the pursuer alledged, That he did shew a leatheren girdle full of money to the defender his landlord, who promised, that nothing should be wanting; that the defender came frequently into his chamber that night, and that next morning, so soon as he missed his money, he notified the same to the defender; the Lords found the libel relevant to be proved *prout de jure*, and declared, That these being proved, they would take the pursuer's oath *in litem* upon the quantity. Stair, 4th December 1661, White *contra* Crockat.

THE Lords found a vintner liable for a cloke amissing in his house, belonging to a party who was drinking in the said house, tho' the cloke was not delivered to the vintner, nor any of his servants; because it was proved to have been lying on the by-table of a waiting-room, when the gentlemens servants were removed to another room to sup, during which time the vintner's own servants attended, and it was missed. Fountainhall, 17th February 1687, Master of Forbes *contra* Steil.

A TRAVELLER having brought in his cloke-bag into an inn, and it being amissing next morning, pursued the landlord, offering to depone that he had a considerable sum in it. The defence was, That the pursuer had taken the cloke-bag with him into his own chamber, whereof he had the key, and not having delivered it to the landlord, he, the landlord, was not liable. The Lords, before answer, ordained the pursuer to bring some evidence that he had money, where he received it, and when. Fountainhall, 19th January 1700, Gooden *contra* Murray.

AN innkeeper being pursued upon the edict, by a party who brought in a purse of gold into his house, which was amissing next morning; and it being proved, that the party shewed his fellow-travellers his purse in the evening, which was found lying empty on the table next morning: As also, that the servants offered him the key of his room, and advised him to bolt the door within, so that none might have access, and yet he could open it himself. And it not being proved that

he had acquainted the house, or shewed what he had about him, the Lords affoizied the defender, and found him not in the case of the edict. Fountainhall, 24th June 1704, Hay *contra* Williamson.

A MAN's breeches, and all that was in them, being amissing in an inn; in a pursuit upon the edict *nautæ, caupones, &c.* the Lords allowed the pursuer's oath to be taken as to what he had in his breeches, and the value of the same, that they might restrict and modify it as they saw cause. Fountainhall, Forbes, 5th June 1707, Browster *contra* Leyes.

A PERSON coming to an innkeeper's house at mid-day, only to bait, and without design of longer stay; the Lords found, That the innkeeper was liable upon the edict, *Nautæ, caupones, stabularii*, for money taken out of a valise upon the horse's back in the stable, tho' neither the horse nor money were delivered to him, but his hostler led in the horses to the stable, Dalrymple, 10th December 1714, Bruce, 14th June 1715, Chisholm *contra* Fenton.

THREE packmen having hired a carter to carry their packs from Air to Kilmarnock, it was libelled, that one of the packs was opened, and L. 80 Scots taken out of it; the Lords found, That it being proved that the pack had been opened after delivery, the defender was liable *de receptis*, and that the packman might prove by his oath *in litem*, that money was in it when he delivered it. Marcus, (*Summons*) July 1687, Ewin *contra* Millar.

NEAREST of KIN.

The interest of the nearest of kin is established upon confirmation.

THE Lords found, That a testament being confirmed, the nearest of kin have *ipso momento jus quæsitum* to that part of the goods which belongs to them, and do transmit the same to their executors, tho' the testament be not executed before their decease. Dirleton, Gosford, 28th November 1676, Ker *contra* Ker. — Any of the nearest of kin dying before confirmation of the defunct's testament, transmit nothing to their executors, their own right being only established by confirmation. Stair, Gosford, 14th February 1677, Duke of Buccleugh *contra* Earl Tweddale. Gilmour, 25th January, Stair, 12th February 1662, Bells *contra* Wilkie. — Nor will their assignies have right. Gilmour, December 1662, Hamilton *contra* Hamilton. — And an executor *qua* nearest of kin, was found to transmit nothing to his representatives but the subjects confirmed, and that a partial confirmation has no effect with regard to any subject left out of the inventory, which may be taken up by a confirmation *ad omiffa* to the first defunct. Marcus, (*Executry*) November 1686, Inglis *contra* M'Moran. — Six executors being confirmed as nearest of kin to a defunct, but the price of some lands sold, not being given up in the inventory, because it was then doubtful whether it would belong to the heir or to the executors; and the Lords having thereafter determined that it belonged to the executors only, and one of them dying after the confirmation, but before the eik was made of that price, and legating his share to another of the executors, his sister; the Lords found, That seeing he was

was confirmed as one of the executors, under the common protestation to eik, and that it was not then clear whether the price would fall under the executry or not, but was so determined after his decease, that his transmitting to his sister by testament gave her his share of the price, as if it had been actually confirmed and in the first inventory, and tho' he was dead before the same was eiked. Fountainhall, 7th June 1709, Chiefly and her husband *contra* her sisters. ---- That confirmation being *additio hæreditatis in mobilibus*, vests the full right in the nearest of kin, not only *quoad* the subjects confirmed, but *quoad* the whole *universitas mobilium* debated, but not determined. December 1735, Gilbert and John Grays *contra* creditors of Drum. ---- Where the nearest of kin themselves confirm, the claim is thereby established, as well as where a stranger is made executor; and tho' they should die before executing the testament, yet an assignation granted by them will stand good and be effectual. 24th June 1737, Mitchell *contra* Mitchell of Blairgorts.

A COMMISSARY, upon application made to him, having inventar'd and seal'd up a defunct's writs, and taken them into his custody, was decerned to deliver them up to the nearest of kin of the defunct, tho' they were not confirmed executors *qua* nearest of kin, which was found upon act 26, parl. 1690, discharging the necessity of confirmation, for this statute supposes, That where the relict, children, or nearest of kin, are willing to subject themselves universally to the defunct's debts, they may enter to possess without any confirmation. Hence the successor, whether in heretables or moveables, may continue the defunct's possession without making up titles, and the relict or nearest of kin, without confirming, may recover possession of what has been unwarrantably intromitted with after the defunct's death. 17th December 1729, Shearers *contra* Wilson.

Not bound to confirm.

ONE having renounced in favours of her brother her interest in her mother's executry, and the brother having uplifted a sum due to the mother, but without confirming the same; the sister after his death confirmed the sum as executor to her mother, and pled, That the renunciation in favours of her brother implied but a *non repugnantia*, and could not bar her to take up the right *tanquam quilibet*, which her brother neglected. Answered, If the defender pay to the pursuer, he must have repetition from the brother's representatives, which is directly counteracting the renunciation of her right in favours of her brother. The Lords found the pursuer's confirmation did accresce to the defender in virtue of the renunciation *quoad* the half, which was the pursuer's interest as nearest of kin the time of the renunciation; but that the confirmation took effect *quoad* the brother's half, which the renunciation did not concern. Marcus, (*Executry*) November 1686, Inglis *contra* M'Moran.

Nearest of kin renouncing their interest.

A DAUGHTER having accepted from her father of a provision in satisfaction of all she could ask or crave by his decease, renouncing her legitim and dead's part; this renunciation was found to bar her from competing with the descendants of her brother, claiming the office of executry as nearest of kin to their grandfather, tho' it was pled for her, That *de facto* they were not nearest of kin, and could be no more confirmed upon that *medium*, than they could be served heirs while there

was a nearer heir in existence ; in respect it was answered, That none can be served but the heirs of the investiture ; and, as a renunciation does not alter the investiture, so it cannot exclude the heir who renounces, nor give the right of succession to another ; but in moveables the office of executor may be renounced, which must give access to the next blood-relation to claim the office, and consequently to retain the moveable estate, which the nearest in kin can lay no claim to after renouncing the same. 21st July 1738, Campbells *contra* Campbell. — In the like case, the children of the renouncer, who were nearest of kin to their grandfather at the time of the confirmation, were also excluded in competition with a remoter descendant of another child who had not renounced. The Lords went upon this footing, That a father, by taking such a renunciation, means to exclude, not only the renouncer, but his or her descendants, reserving his effects to his other children and their descendants: But this exclusion will not have place where the competition is with the fisk, or even with collaterals ; and some of the Lords were of opinion to carry the exclusion no further than in favours of the children themselves, not of their descendants. 2d February 1731, Campbell *contra* M'Leod.

WHO are nearest of kin? See Succession.

NEGOTIORUM GESTOR.

THE action *negotiorum gestorum* is competent only to the mandant, not to the mandatary. Home, 21st June 1726, Johnston *contra* Marquis of Annandale.

A SUM of money being advanced by the manager of a person of quality's estate to one of his Lordship's friends, who, by advice of the other relations of the family, went abroad to acquaint him with the state of his affairs, and to solicit his home coming; the Lords found the master himself after his home coming, bound to allow the money so advanced, tho' the friend's journey proved at that time ineffectual. Bruce 1st December 1714, Smith's children *contra* Earl Winton.

NONENTRY.

In what
holdings does
it take place?

LANDS holding burghage fall not in nonentry, because the burgh or incorporation, which is properly the vassal, never dies. Balfour, (*Nonentry*) 10th December 1523, burgh of Haddington *contra* John Carnbee. Haddington, 20th June 1612, *contra*.

Takes place
until actual in-
feftment.

THE Lords found, That lands are to be understood in nonentry till infeftment be actually taken, altho' resignation has been made in the superior's hands. Balfour, (*Nonentry*) 13th March 1502, the King *contra* Scorgeith. — Found, That the granting of a precept of *clare constat*

constat purges not the nonentry so long as the vassal is not seised. Durie, 23d March 1630, Hay *contra* Ld. Auchnames. Auchinleck, (Nonentry) 3d July 1633, Hay *contra* Crawford.

NONENTRY-DUTIES run till the heir be retoured, and get precepts out of the chancery, requiring the superior to infeft him, because a precept of *clare constat*, is *voluntatis* and what the superior is not bound to grant; and therefore he cannot be *in mora* for refusing. Fountainhall, 17th, Stair, 18th July 1678, Fullerton *contra* Denholms. --- An adjudger having charged the superior to infeft him, and made offer of a charter with a year's rent, this was found to put the superior *in mora*, and to make him liable for the full rents, he being in possession by a declarator of nonentry. Forbes, 24th July 1713, The university of Glasgow *contra* Hamilton. --- But a simple charge is not sufficient to put the superior *in mora*. Stair, 9th February 1669, Black *contra* French. Marcus, (Nonentry) March 1684, Duke Hamilton *contra* Elies. Marcus, (Nonentry) July 1687, Ld. Powrie *contra* Smith. --- A requisition made by a vassal to his superior to enter him, found sufficient to free him from the full nonentry-duties thereafter, tho' he had made no offer to satisfy bygone nonentry-duties, in respect the superior had no right to the bygones, which had been gifted by him, and the gift intimated to the vassal; so that the superior could have no just pretext to refuse a precept. Gosford, 10th February 1671, Ld. Kelhead *contra* Carlyle.

Unless the superior be *in mora*.

In a declarator of nonentry, the Lords found, That before decret the retoured duty was only due, because, before that, the tenants could not be warned to remove. Colvil, March 1587, Drummond *contra* Forrester. --- Found, That a superior cannot have right to the farms of the lands without declarator; and that he could not enter thereto *brevi manu*. Hope, (Nonentry) 7th December 1614, Brown *contra* M'Culloch. --- The full mails and duties are due from the time of the citation in the general declarators of nonentry, and not from sentence only. Stair, Dirleton, 25th July 1666, Harper *contra* Hamilton. --- The like. Gosford, 29th, Stair, 30th January 1671, Douglas *contra* his vassals. Stair, 12th June 1673, Faa *contra* Ld. Powrie. Fountainhall, 7th November 1701, Baird *contra* Morison.

Full mails not due till declarator.

THE superior before declarator has only right to the retoured duties, except three terms immediately subsequent to the ward; for which three terms the nonentry was found to be of the nature of the ward, and therefore that the superior might seek them without declarator of nonentry, just as he might do during the ward without any declarator. Durie, 23d March 1622, Lord Leslie *contra* Ld. Pitcaple. Durie, Auchinleck, (Nonentry) 19th July 1631, Earl Kinghorn *contra* Strang. --- Found, That tho' an apparent heir's minority being expired, the ward ceased; yet the superior and his donatary being in possession by virtue of the ward, he had right to the full mails and duties of the lands, till an offer was made not only of a charter, but also of a year's rent, if he was a singular successor that offered to enter, and that nonentry subsequent to the ward was of the nature of the ward; And tho' it was urged, that he had only a right to three terms, conform to many practicks cited from Durie, Hope, Stair, &c. yet

Unless the superior be already in possession by the ward.

the plurality found, That he had right to the full rent beyond these three terms, until he was interpellated. Fountainhall, 25th February 1696, Earl Cassils *contra* Kennedy. --- A nonentry preceeding the ward being pursued for, the Lords found no difference betwixt that and common nonentries, and therefore allowed only the retoured duties being before declarator, (tho' it was alledged, that this kind of nonentry was of the nature of the ward itself) and this because the superior was not in possession. Spotiswood, (*Nonentry*) 21st July 1626, Leslie *contra* Leslie.

What are the nonentry-duties before declarator?

WHERE lands hold feu, no more is due for nonentry but the feu-mail. Colvil, June 1591, Master of Lindsay *contra* Hamilton. Maitland, 19th December 1554, Douglas *contra* feuars of Colburn. --- A declarator of nonentry, and comprising thereon, was reduced, for this reason, That before declarator the feu duty is only due; whereas the comprising had been deduced for the whole mails and duties. Durie, 19th July 1631, Earl Kinghorn *contra* Strang.

IN a blench holding, the superior, before declarator of nonentry, can claim no more but the retoured blench duties. Durie, Spotiswood, (*Nonentry*) 3d February 1631, Ogrie *contra* Murray. --- An infestment of annualrent, holding blench for payment of a peny money, the nonentry-duty found to be only the blench duty until declarator; and the Lords resolved to decide so in all time coming. Fountainhall, Marcus, (*Nonentry*) 19th March 1685, Lockhart and Douglas *contra* Earl Roxburgh.

Nonentry-duties how ascertained?

THE Lords found, That the retour of the whole barony, whereof the lands libelled were a part, served for the lands fallen in nonentry to exclude any further to be sought for these lands before declarator, except the proportion of the mail, to which the whole barony was retoured; altho' these lands were not specially retoured *per se*. Durie, Haddington, 5th February 1623, Ker *contra* Scot. Durie, 23d March 1622, Lord Leslie *contra* Ld. Pitcaple.

Full mails not due from citation, where the defender has any colourable excuse.

A GIFT of nonentry granted before the casualty fell, and a general declarator thereupon, were sustained as a good title to the nonentry-duties, after falling of the casualty, the superior concurring in the pursuit; but the full mails and duties were only found due from the time of the superior's concurrence, not from the citation in the general declarator. Stair, 17th February 1675, Stewart *contra* Ld. Forrester. --- The full duties are not due from citation in the general declarator, if the vassal has any probable ground of mistake. As for example, the pursuit being at the instance of an assigney from the superior, the full duties were not sustained, but from production of the assigney's title. Dirleton, 23d June, Stair, 16th July 1675, Ld. Kelhead *contra* his vassals. --- No nonentry was found due where the vassal was taken prisoner by the publick enemy, and remained prisoner all the time libelled. Maitland, 19th March 1554, Rolland *contra* his vassal. --- An apparent heir being debarred from entring while there was possibility of the existence of a nearer heir, the lands were found to be in nonentry, but that the King had no right to the fruits as *bona vacantia*; and seeing the heir was debarred from entring, and was neither in *culpa* nor *mora*, the nonentry was not extended to the full mails and

and duties, but the same were found to be in *hereditate jacente*, to be managed by a curator *bonis*. Stair, 24th July 1677, Lord Melvil *contra* Bruce. ---- A vassal standing infeft under the great seal holding of the King; but the Lords having found the infeftment to be null; and in a declarator of nonentry the question being, from what period the full mails and duties should be due; the Lords found the full mails due only from the date of their interlocutor, finding the infeftment null, the defender before that time being in *probabili ignorantia*. Fountainhall, Forbes, 22d January 1706, Earl Lauderdale *contra* Brand. ---- The like. Bruce, 24th June 1715, Heriot's hospital *contra* Hepburn. Bruce's MS. 22d November 1716, Creditors of Newton *contra* Johnston.

LANDS being full for thirty six years, this found to exclude the donatar of nonentry, notwithstanding of the ordinary time of prescription in other such cases. Colvil, June 1589, Sibbald *contra* Oliphant. ---- Lands being full for thirty six years preceeding litiscontestation, in a declarator of nonentry, the Lords found, That this purged the said nonentry for all years preceeding, and this ordained to be a practick in all time coming. Haddington, 4th March 1593, Earl Crawford *contra* Ld. Balmubie. ---- Found, That the lands being full for forty years, did purge all preceeding nonentries. Hope, (*Nonentry*) 14th June 1613, Arthur *contra* Ld. Blebo. ---- An infeftment standing for forty years, clad with possession for several years past, was found sufficient to exclude declarator of nonentry, tho' it was sought with respect to another vassal with whom the possessor did not connect. Durie, 25th June 1629, Murray *contra* Ld. Inchmartin. ---- An infeftment granted by the King with *novo damus*, and clad with fifteen years possession, was found sufficient to defend against a declarator of nonentry; whether prior or subsequent to said infeftment, tho' pursued upon the nonentry of a different vassal, whose right to the lands was preferable to that of the excipient's author, but prejudice to the pursuer to insist in a reduction of the excipient's right, or in mails and duties, as accords. Durie, 25th June 1629, Murray *contra* Ld. Inchmartin. ---- Tho' it is a good defence against all preceeding nonentries, That the lands have been full for the space of forty years; yet this was repelled as *jus tertii*, when proponed by a party who had no right to the infeftment by which the lands were alledged to be full. Durie, 19th, Spotiswood, (*Nonentry*) 20th March 1629, Douglas *contra* Earl Lauderdale.

Nonentry
excluded
where the
lands have
been full thirty
six years.

A CONJUNCT fee excludes nonentry. Balfour, (*Nonentry*) 14th February 1554, Queen's Advocate *contra* M'Dowall. ---- The like, tho' the wife had renounced the conjunct fee, and taken her to a simple liferent. Balfour, (*Nonentry*) 10th January 1566, Bryce *contra* Flethour.

Conjunct fee
excludes non-
entry.

THREE consecutive *safines*, liberate from bygone nonentries. See *Presumption*.

IN an infeftment a me, if the lands be in nonentry before confirmation? See *Confirmation*.

WHETHER the lands fall in nonentry by the death of the adjudger or his debtor? See Vassal.

IMPLIED discharge of nonentry-duties. See Implied Discharge.

NONENTRY if debitum fundi? See Personal and Real.

NONENTRY requires declarator. See Declarator.

NONENTRY, gift of. See Gift of Nonentry.

NOVO DAMUS.

A CHARTER of resignation containing a *novus damus*, with an express grant of a right of patronage of the parish of Ancrum, was preferred to a posterior grant of the said patronage from the same author, tho' it was pled, That a *novus damus nihil novi juris tribuit*, and the said patronage was not resigned, nor did belong to the resigner *ab ante*; in respect it was answered, That a *novus damus* infers a new grant as well as a renovation, and every thing expressed is understood to be habily disposed, whether there was any antecedent title in the resigner's person or not. Stair, 29th February 1680, Scot *contra* Archbishop of Glasgow ---- The like. 14th July 1737, Heretors of Spey *contra* Duke Gordon. ---- A charter of *novus damus* from the crown on the obtainer's resignation, containing this clause, not in the former charter, *cum turribus, fortaliciis, &c. una cum terris vulgo Hail-Sea-greens, communibus passagiis, viis dictarum terrarum usitat. & consuet.* was found to give no new right to Sea-greens, nothing having been understood given but use and wont. Dalrymple, 25th November 1714, Bruce of Powfoulis *contra* Rashiehill.

NOVO DAMUS, how far it implies a discharge of the casualties of superiority? See Implied Discharge.

O A T H.

Oath in litem.

In what cases admitted?

ONE being pursued to restore a watch, or the *pretium affecti-onis*; the defence was, That *sine dolo desit possidere*, having, in the pursuer's presence, given away the watch, the pursuer making no opposition. The Lords would not suffer the price of the watch to be proved by the pursuer's oath, but *prout de jure*. Stair, 3d July 1662, Lord Coupar *contra* Lord Pittligo. ---- Some goods in a ship being damaged by the skipper's neglect, the pursuer's oath *in litem* was not admitted, but he was ordained to prove the damage.

Stair,

Stair, 11th December 1672, Carnegie *contra* Napier. ---- Some goods having been alledged stolln out of lockfast places in a country house, the master's oath *in litem* was sustained as a proof of the quantities and values, against the servant to whom the key of the outer-door was intrusted, and who was not alledged to have any accession to the theft, but who was found liable upon this single circumstance, that he had been *versans in illicito* in lodging a travelling packman one night in his master's house; tho' the packman was not the thief, and the goods must have been stolln some time thereafter. It was argued for the servant, That the oath *in litem* can only be admitted where it is *aliunde* certain a theft is committed; and supposing this proved, can only be admitted against the person who has been principal or accessory to the theft: And yet here there is no other proof, save the pursuer's oath, that any theft was committed at all, neither is the defender alledged to be accessory. And the circumstance of lodging the travelling packman, when no damage happened, cannot be qualified more penal than neglect. Which was repelled, in respect it was answered, That supposing the servant liable, there scarce can be any other proof in the nature of the thing save the master's oath. See Stair, *lib. 4. tit. 44.* § 4. 21st December 1734, Campbell *contra* M'Lairan.

In a spuilzie of teinds it was contended, That by the 15th and 17th acts, parl. 1633, spuilzie of teinds is taken away, and every heretor allowed to draw his own teind; which was repelled, in respect that by the said acts, particularly the 17th, heretors have only the leading of their own teinds during the dependence of a valuation; but the Lords declared, That in this case they would not sustain spuilzie as to the oath *in litem*, Stair, 18th December 1662, Lord Balmerino *contra* Town of Edinburgh. ---- A party's goods being pointed by mistake for the goods of one of the same name; in a reduction and spuilzie, the Lords allowed the pursuer the benefit of his oath *in litem*, not so much for violent profits, (the goods being household furniture which have no product) as for damages. Forbes, 21st, Fountainhall, 22d February 1706, Henderson *contra* Dunbar.

A THIEF having declared under his hand, that he had stolln some particular books, which he mentioned, and besides these several others in general, and then escaping out of prison by the goaler's fault; the Lords, tho' they found the particular confession probative, yet refused to take the pursuer's oath *in litem*, with respect to the general clause in the said declaration, as to what other books were stolln from him, thereby to load the goaler. Falconer and Fountainhall, 6th November 1683, Schaw *contra* Vanse. ---- The oath *in litem* was so far allowed by the Lords, in a process at the master's instance against his apprentice's cautioners, in the case of domestick theft, and when there was a tract of thieving proved; that they allowed the master to condescend upon the particular species, quantities and prices, and to give his oath *in litem*, reserving to themselves to modify after his deposition. Falconer, 7th November 1684, Home, March 1685, Forrester *contra* Merston.

NOTWITHSTANDING the known rule, That *unicuique licet favori pro se introducto renunciare*; yet a spoliation being proved, the Lords refused to allow the quantities to be proved by witnesses; but

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ordained

Where there's
probabilis igno-
rantia.If sustained
against the
delinquent's
cautioners?Oath in B-
tem in spuil-
zies.

ordained the party to give his oath *in litem*. Colvil, January 1582. Home, *contra* Ld. Bafs. ---- A party who had libelled gold, silver, jewels, &c. taken out of his coffer, and having proved the up-breaking thereof, and only some powder and arms to have been away taken, the Lords admitted the rest to the pursuer's oath *simpliciter*. Colvil, 24th July 1580, Dean of Murray *contra* Ld. Coxton. ---- There being particulars of divers natures libelled in a spuilzie, as insight-plenishing, oxen, horses, corn, &c. and the witnesses having proved spoliation of some corns and no further; the Lords allowed the pursuer's oath to be taken upon all the other particulars, tho' of different natures; and he having sworn upon the insight-plenishing, they allowed the oath, and found, That he might so depone upon all; but taxed the prices deponed upon, no man compearing here for the defender. Colvil, 20th March 1573, Jarden *contra* Lady Melgum. Durie, Spotiswood, (*Ejection and Spoliation*) 8th March 1628, Brown *contra* Murray. ---- One having, without due order of law, intruded with a pack of goods left in his hands by his debtor as a security for the debt; the debtor was allowed his oath *in litem*, tho' it was pled for the creditor, that he had caused four of his neighbours inventar and price the ware. Stair, 3d January 1667, *contra* Brand.

Oath *in litem*
sometimes re-
fused.

THE *juramentum in litem* was refused to be allowed to a pursuer, who *verisimiliter veritatem ignorabat*. Sinclair, 19th May 1542, Pitcairn *contra* Kirkaldy. ---- The Lords found, That in an oath *in litem* the party may depone also upon the quantity, where the witnesses are not positive how many of each kind were taken away; but if there be a concurring probation agreeing on the quantity, that his oath *in litem* ceases in this case. Fountainhall, 16th January 1697, Fea *contra* Elphinston.

Oath *in litem*
taxed.

ALTHO' conform to practick long used, when a spuilzie is proved, the quantities ought to be referred to the pursuer's oath; yet now the Lords thought fit to alter the same, and follow the civil and canon laws, that the oath should be taken *cum taxatione judicis*; and found, That the Lords might, if it were victual and profits, modify the prices. Colvil, 10th May 1579, Gordon *contra* . ---- Found, That a spuilzie being proved, their Lordships might refer to oath of party the quantity and quality of the things spuilzied, and only reserve to themselves the modification of the prices. Colvil, February 1581, Balfour *contra* Commendator of Cambuskenneth. ---- One having got a disposition of some goods and furniture, and the disposition being borrowed up out of a process by the disponent's relict, and she pretending that it was lost, the party pursued her for damages, and craved he might be allowed to prove the quantity and kind of goods contained in the disposition by his oath *in litem*, seeing they consisted of many particulars which he could not otherwise prove; the Lords allowed his *juramentum in litem* as to the quantities, reserving to the defender her defences competent against the disposition, and against the value and price of the goods libelled. Marcus, (*Oaths*) February 1684, Dougal *contra* Mardoch. ---- A trunk being proved to have been stoln, the owner was allowed *juramentum in litem*, but was not allowed to swear

as to bonds and writs he alledged were in the trunk. *Harcus, (Oaths)*

February 1688, *M'Pherson contra Auchlossin*. --- In a spuilzie, the question being, How the quantity of the goods spuilzied was to be proved, the defender pleaded, 'That tho' the oath *in litem* should be admitted instead of any other proof on the pursuer's part, yet he, the defender ought to have a conjunct proof. Answered, Such conjunct proof is without precedent, the constant practice being *per modum pœnæ* to admit the pursuer's oath in place of all other proof. In our ancient practice this oath was subject to no modification, tho' afterwards a practice was introduced of obliging the pursuer before deponing to give in a condescendence of his damages, which the Lords modified, and afterwards obliged the pursuer to give his oath *in litem*, to be a further check in case the modification were too high. The Lords refused a conjunct probation, but ordained the pursuer before deponing to give in a special condescendence of the corns and straw spuilzied, and of the grounds of the estimate made by him. 19th November 1737; *Man contra Campbell of Ledchary*.

Oath in Supplement.

IN an action of spuilzie of a horse, the exception of redelivery being admitted to the defender's probation; and one witness deponing, That the pursuer's wife directed her son to receive the horse, and that she accordingly caused him put him in the stable; and another swearing, that he heard the husband say at another time, That he had received the horse, tho' none ever deponed, that he saw the horse in his possession, the Lords found, That tho' these depositions were not sufficient to prove the exception, yet that it was such a presumption as to induce the judge to take the excipient's oath of verity upon the said exception. *Durie*, 28th March 1628, *Cairns contra Hunter*.

A PARTY having intrusted a sum to another to buy goods for him abroad, and the trustee having been robbed of all by the way, the Lords assilzied the trustee, but obliged him to give his oath in supplement. *Newbyth*, 22d June 1666, *Beg contra Nichol*.

A MERCHANT pursuing a gentleman's heir and his tutor, for payment of an accout furnished to the defunct, and having proved the delivery by his apprentices (it being within three years;) but the price, and part of the goods not being fully proved, the Lords ordained him in supplement to give his oath on the truth of the furnishing and prices. *Fountainhall*, 14th January 1687, *Braidfoot contra Elphinston*. --- In a process upon the passive titles at the instance of a tradesman, the witnesses having only deponed, that they knew the defunct bought things of that kind from the pursuer, and that he was his ordinary who furnished him in all such things, but could not be particular, either as to the quantity or value; the Lords refused to take the pursuer's oath in supplement of this defective probation, in regard the *juramentum suppletorium* is only permitted in law, where there is, at least, a *semiple-na probatio* of the libel by one or other pregnant circumstance. *Fountainhall*, 28th December 1695, *Thomson contra Carneggie*.

Oath of Calumny.

In what
processes can
it be demand-
ed?

IN a cause of deforcement, tho' only pursued before the Lords *ad civilem effectum*, 'twas found, That the defender was not obliged to give his oath of calumny, *ne detur occasio perjurio*. Colvil, Spotiswood, (*Juramentum calumniæ*) April 1583, *contra* Master of Gray.--- In a reduction and improbation the defender insisting upon the pursuer's oath of calumny, whether he had reason to alledge, That all the writs called for were false, &c. the Lords found the pursuer was not obliged to give his oath of calumny before production : For the very design of the process is, by libelling at random, to force production. Dalrymple, 22d November 1716, Sir Patrick Home *contra* Earl of Home.

If a procu-
rator's oath
of calumny
may be de-
manded ?

A PROCURATOR or advocate was compelled to give his oath of calumny, that he was truly so informed by the party, and that he had not devised the alledgeance himself *animo protelandi litem*. Auchinleck, (*Probation by oath*) 7th July 1629, Baird *contra* Leslie.

Cannot be
given by
proxy.

FOUND, That the above oath cannot be given by proxy. Maitland, 5th April 1557, Lady Lovat *contra* the Lord.

Can only
be demanded
upon the
whole libel.

WHERE a libel consists of divers points, the Lords found, that the defender is not bound to give his oath of calumny upon each of them particularly, but only generally upon the whole libel. Balfour, (*Oath of Calumny*) ult. February 1558, Ld. Drumquhafil *contra* Ld. Glenegies. Colvil, May 1582, Ld. Gadzeard *contra* Sheriff of Air. Hope, (*Oath of Calumny*) 25th May 1611, Ld. Monimusck *contra* Ld. Kincaufie.--- In a reduction containing improbation, the defender craving the pursuer's oath of calumny, if he had just cause to pursue improbation of the writs called for ; without which he alledged he could not be compelled to produce, seeing he was content that the same should be reduced for not production ; but if the pursuer could give his oath, That he had just cause to improve, he, the defender was content to produce ; the Lords found, That the pursuer could not be compelled to give his oath upon that part of the summons, if he had just cause to pursue the improbation, it and the reduction being both in one summons, and that he ought only to give his oath *de calumnia* upon the whole libel as it stood, if he had just cause to pursue the same. Durie, 16th December 1629, Earl Galloway *contra* Maxwell.

If it can be
demanded at
any period of
the process ?

A PURSUER was found not bound to give his oath of calumny upon the libel, after the same was admitted to probation, and witnesses or other probation received. Balfour, (*Oath of Calumny*) 4th February 1558, Ld. Drumquhafil *contra* Ld. Glenegies.--- An oath of calumny was ordained to be given even after the cause was concluded, and all further probation renounced. Colvil, January 1582, Ker *contra* Ker.--- In a spuilzie of teinds, the Lords found, That in this and the like cases, altho' the pursuer might prove the quantity spuilzied by witnesses, and refuse to give his own oath, it not being *in facto proprio* ; yet that, before sentence, he ought to give his

his oath *de calumnia* or *ex credulitate*, that he believed, and was truly informed, that the quantity proved against the defender was true, because the pursuer ought not to have sentence for any thing, which, by his oath, he believed not to be true, altho' it should be proved and decerned. Haddington, 19th June 1610, Bulmer *contra* Williamson. Durie, 28th June 1623, L. Blantyre *contra* Tenants of Glasgow. Durie, 28th February 1624, Gladstones *contra* Hamilton. Durie, 13th January 1625, Lord Duffus *contra* Monroes. Durie, 26th January 1628, Ld. Drum *contra* Tenants of Lefmore. --- The Lords inclined to think, that a party was not obliged to give his oath of calumny on an alledgeance, where he had fully proved it by writ or witness; since such oaths are only to supply the defect of probation, tho' an oath of verity may be demanded at any time. But here the Lords ordained the party to give his oath of calumny on an alledgeance, in regard the probation was not full. Fountainhall, 22d December 1699, Logie *contra* Graham.

THE defender refusing to give his oath of calumny, and thereupon being holden as confess'd; the Lords found, That sentence may be pronounced, altho' the libel be not otherwise proved. Colvil, 6th February 1579, Cuningham *contra* Ld. Kerse.

What if the party refuse to give his oath of calumny?

OATH of PARTY.

AN arbiter was compelled to give his oath, upon a promise made not to decern in prejudice of one of the submitters. Hope, (*Arbitration*) 3d March 1609, Elphinston *contra* Elphinston. --- Two creditors of a rebel alledging, That the gift of his escheat was taken to his own behoof, and the one recovering an incident for proving his exception, and the other, upon neglect of that, being forced to refer it to the donatar's oath of verity, altho' the donatar alledged the hazard of perjury; yet the Lords thought that the probation might divide, the parties being divers, tho' they were about to prove one and the same thing, and therefore their Lordships ordained the donatar's oath to be taken. Spotiswood, (*Probation*) 25th February 1624, Duff *contra* Keith and Boyd. --- A party alledging against a discharge, That a certain clause in it was never communed upon, but inserted privately by the other party, who wrote it all himself, and omitted to read it when he read all the other clauses, and that the subscriber was then overtaken with drink, all which he referred to the other party's oath; this was sustained relevant and probable in manner foresaid. Durie, 5th December 1626, Schaw *contra* Balfour. --- In a criminal process for a bloodwit before an inferior judge, the Lords found, That the fact libelled might be proved by the defender's oath. Durie, Spotiswood, (*Barony*) 13th February 1634, Edgar *contra* Darling. --- A party, who had accession to a forgery, was ordained to depone thereupon. Fountainhall, 15th November 1677, Thomson *contra* Ross. --- Found invasion and battery relevant to be

In what cases admitted?

proved, either by the party's oath or by witnesses. Fountainhall, 24th July 1678, Gordon *contra* Crookshank. — The magistrates and some other burghesses of a burgh, being fin'd by the Justices of Peace of the county in L. 100 *Sterl.* each, for importing Irish victual, the fact being referred to their oaths: The Lords, in a suspension of this decreet, found, That this delinquency was probable by oath, as well as usury, and other such like. Forbes 24th, Fountainhall, 29th January 1712, Justices of peace of the shire of Air *contra* Town of Irvine. — A complaint before the Bailies of Edinburgh, bearing, "That the defender publickly, at the cross of Edinburgh, gave the complainer opprobrious names, spit in his face, and desired him to resent it if he durst, which had no other meaning than a challenge," being restricted to a pecuniary mulct, was found probable by the defender's oath. 2d January 1736, Stewart *contra* Campbell.

Must be special.

A TRADESMAN's accompt of things furnished to a gentleman, being referred to oath, and he deponing, That he owed the tradesman nothing on that account; and being urged to be more special, and refusing to say any more, the Lords, upon the pursuer's application by bill, ordained the defender to be re-examined, seeing parties ought not to depone upon law, but only *super facto*, nor whether they think themselves obliged in law, but whether they received such goods or sums, and on what account, and in what terms, and how they paid or can exoner themselves of it, as gifted or otherwise; and the Lords declared, That at advising they would consider how far the qualities adjected were proper and pertinent, and did prove themselves. Fountainhall, 10th July 1707, Callendar *contra* Wallace.

If a party is bound to depone a second time upon special interrogatories?

AN executor, notwithstanding the oath given upon the inventory, may be urged to declare upon oath, whether, since the confirmation, it is come to his knowledge, that some goods and debts were omitted, which he did not know the time of the confirmation; and whether he has gotten greater prices than are contained in the inventory. Dirleton, 16th July 1667, Ker *contra* Ker. — In a tutory accompt, it being alledged for the pupil, That the tutors had intromitted with more goods, and gotten greater prices, than those contained in the inventory given up by them, when they confirmed the pupil executor to her father, which was referred to their oath; the Lords found, That the tutors ought to depone both as to the prices received, and as to the intromission; and found, That it could not infer perjury against them, who had only given their *juramentum credulitatis* at the confirmation of the testament. Gilmour, 2d June 1665, Waterston *contra* her tutors. — In a process for payment, the defender condescended upon payment made to the pursuer's servant, who thereupon deposed *non memini*, thereafter an accompt being produced by the defender, written by the servant, and a letter relative thereto, acknowledging the receipt of the money, the servant was ordained to be re-examined upon sight of the accompt, which could not clash with his former oath, which was not positive, being only *non memini*. Stair, 29th July 1673, Mowat *contra* Earl Southesk. — The libel in a process being referred to the defender's oath, and he having declared upon a general interrogatory, that he was not owing the sum acclaim'd; the Lords refused thereafter to put a special interrogatory to him, viz. whether or not he

he had received a parcel of such and such goods, and what way he had paid the price thereof; because it was not desired that he should be so interrogated when he did declare; and having deny'd that he was any ways debtor, he would be involv'd in perjury, if, upon a special interrogatory, he should acknowledge that he was debtor upon the accompt therein-mentioned. Dirleton, 8th June 1677, Campbell *contra* Tait. — The like. Stair, 30th November 1678, Husband *contra* Blair. — A defender, to whose oath the libel was referred, acknowledging that he received the money, but that it was in payment of a sum due to him by the pursuer, and the pursuer afterwards offering to prove by the defender's oath, That he was owing him no sum, unless it was upon a minute of tack, which never took effect, being deposited upon conditions which never existed; the Lords refused to re-examine the defender, as being likely to involve him in perjury. Fountainhall, 10th November 1702, Aitken *contra* Finlay. In this case the Lords resolved to keep a method in examination, first to examine upon the special interrogatories, and last upon the general.

THE Lords obliged a party to make oath even *super facto alieno*, If obliged in a trust, where it was libelled, That the trust was consistent with the deponent's knowledge, it being a trust committed to her father. Newbyth, 5th January 1665, Dunbar *contra* Ruthven. — In a pursuit for above 20 years abstracted multures, the defenders were obliged to depone, whether they knew what they were resting of multures, and what was the quantity; but they were not put to the necessity to depone that all was paid, after so long a time. Stair, 12th December 1679, Inhabitants of Kirkaldy *contra* Ramsay.

O B L I G A T I O N.

A PROMISE found to be obligatory, tho' but *nudum pactum*, Promise is without any preceeding cause. Haddington, 9th January 1623, Kintore *contra* Sinclair. Promise is binding in law.

AN offer which comes out to be of the nature of a simple promise, requires not acceptance; but if it imply any condition or mutual obligation, it must be accepted *debito tempore*, or no obligation will arise. Stair, 25th June 1664, Allan *contra* Colzier. — A promise by one of three cautioners, *viz.* That he and another of the cautioners should bear equal burden with the third, of the sum, albeit in effect not accepted by the third cautioner, in so far as he had caused the creditor charge one of the cautioners for the whole sum; yet was found obligatory, and the cautioners reason of suspension founded thereon was found relevant. Haddington, 12th July 1610. Ld. Parbrothe *contra* Weemyss. Offer, in what cases does it require to be accepted?

THE Lords sustained a bond, altho' the party did therein bind his heirs and successors, but not himself, that subtilty of the common law having been repudiated by the latter constitutions, as a pure nicety. One may bind his heirs with our binding himself.

Fountainhall, 21st January 1708, Hamilton of Bangour *contra* Lord and Lady Ormiston.

Personal obligation, in what cases implied?

A CLAUSE in a contract of marriage bore, *That the husband should have the tocher out of the first and readiest goods of the wife's father*; the representative of the wife's father being pursued to pay the tocher, argued, That he was not liable personally, unless he had intromitted with the defunct's means. The Lords found him liable, seeing the clause being *in re dotali*, it behoved to be interpreted *cum effectu*; and in cases conceived *passive*, where it does not appear who is obliged, the contracter is understood obliged. Stair, 22d February 1665, Mowat *contra* Dunbar.

Clauses whether to be understood as inferring an obligation or a resolution only?

A LEGACY left in terms, *I wish, &c.* was found sufficient, and was not considered as a desire only or recommendation left in the option of the heir. Stair, 25th July 1662, Nasmyth *contra* Jeffray.

A DYING person having desired her landlady to bring her a napkin, wherein she said there was a *L. 20 Sterl.* Bank Note, which she intended to give in token of her kindness to one then come to see her; and upon her seeming to be in passion and trouble when the napkin, being brought, was found to contain nothing but a blank piece of paper, the landlady having said to the designed donatary, that she would make up the *L. 20* to him, in case it was not made up another way; the Lords found her liable for the same, unless she could instruct that he recovered payment some other way; tho' it was argued, That these were to be esteemed words of course, uttered not *animo deliberato*, or for any binding cause, but to sooth a dying lodger. Forbes, 2d, Fountainhall, 3d January 1712, Reoch *contra* Young.

A DEBITOR's relict having written in the postscript of a letter, not to the creditor, but to a third party, these words, *Shew such a person, that if I were come, &c. she shall be paid, &c. if it be his bounty will to spare me*: The Lords found, That these words not only imported a resolution but an obligation. Bruce, 10th July 1717, Paterfon *contra* Inglis. — One having received a letter abroad from his friend, that there was a treaty of marriage with his sister on foot, and the man desired 400 merks of portion; he wrote back to that friend, that he was willing to give 200 Merks to forward the design, who having given the letter to the suiter, the parties were afterwards married, and they pursued the brother for payment of the 200 merks. It was alledged for the defender, That the letter was no positive obligation, but the declaration of a bare resolution, and tho' it were thought to import a promise, the offer was not accepted. The Lords decerned the defender to pay the 200 merks. Marcus. (*Contracts of Marriage*)

December 1681. Beatrix Tunno and Brotherstones *contra* Andrew Tunno. Hugh Kennedy disposed his estate upon deathbed in favours of his son, and failing him to Sir John Kennedy; after the son's death; this deed being call'd in question by Hugh Kennedy of London, a remote heir; Sir John Kennedy alledged, That the son, apparent heir at the time, had homologated the deed, which made it unquarrelable by any remoter heir, and he produced a missive letter in these words, *Depend on it, I shall adhere to that right my father made, failing me in your favours, and that you may give the more credit to what I here aver, I have made no other title to my estate, but have used*

used the same as my evident. It was pled, That this did only import a resolution, but no direct ratification or homologation, which accordingly the Lords found. 2d January 1723, competition Kennedy with Kennedy.

OBLIGATION to grant a tack to a wadsetter, to commence upon redemption of the lands, not found good against a singular successor, tho' the defender was in possession, not being conceived *per verba de presenti*, but only, as said is, in terms of an obligation. Durie, 16th December 1629, Hunter *contra* Tenants. — In the year 1609, the parson of Prestonhall granted a tack of teinds, expiring in February 1728; in the end of the tack there is an obligation upon the granter and his successors, parsons of the said parish, after the ish of the present tack, to renew the same in favours of the tacksmen and his heirs, for the like number of years, and the like tack-duty: The question was, if this obligation to renew was real and good against singular successors in the right to the teinds, so as to defend the tacksmen and his heirs against the patron, who obtained right to the said teinds, in virtue of the act 1693, before any possession could be had upon the said obligation. It was pled for the tacksmen, The obligation to renew is of the nature of a proration, which is a real right, and this must have been the meaning of parties; for, considered as a personal obligation, it could have no effect beyond the granter's life, seeing he could not bind his successors in office. Answered for the patron, Had the teinds fallen below the tack-duty, there was no obligation upon the tacksmen to continue in possession, and pay the tack-duty after expiration of the tack in the Year 1728; this obligation then can never be understood the same with a tack, or a proration of a tack, since it is not so much as a mutual contract. The Lords found the obligation not effectual against a singular successor. 26th January 1737, Sir James Dalrymple of Hails *contra* Hepburn of Beenstoun. — A person who had right to lands by disposition, containing procuratory and precept, without infeftment, granted a personal obligation to convey the same to one, and thereafter the disposition was adjudged by another: The creditor in the personal obligation pled preference upon this *medium*, That an obligation to assign a personal right is a virtual assignation, by which the common author was denuded before leading the adjudication, according to the brocard, That a personal conveyance denudes of a personal right. On the other hand it was pled, that an obligation to grant a right may be equivalent to the right itself, where the question is with the obligant, but never can be in competition with third parties, especially where the right to be granted is a procuratory or precept, an obligation to grant which, will be no warrant for infeftment. The Lords found, That the obligation to convey the disposition in question, did not transmit the same, but that it did remain in the debtor's person, subject to the posterior diligence of creditors. 17th January 1734, Sinclair *contra* Sinclair.

AN heir having obliged himself to provide the younger children, by the advice of five friends therein-named, in what he should be able, upon their arrival at perfect age; when the term was come, three of the friends, by a writing under their hand, modified the sums to be paid, but without calling the heir, or meeting together, their subscriptions

tions having been obtained separately, and as to the other two, the one was dead, and the other refused to subscribe; the Lords found, That the friends could not legally determine without calling the heir, and without being met together. Bruce's MS. 5th July 1717, Gordons *contra* Gordon.

Obligation
granted in im-
plement of an
unlawful pro-
mise.

IN a son's contract of marriage, the father having become bound to provide his estate to his son, and the heirs-male of the marriage, "free of all charge and burden;" and having reserved no power to provide younger children, he at the same time privately elicited from his son a promise, to grant him a faculty of burdening the estate with a certain sum to his younger children; which promise the son having fulfilled after the marriage, by granting a bond upon the narrative of the promise, and that the contract of marriage had been entred into by the father in compliance with the bride's friends, that there might be no stop to the marriage; the Lords reduced the bond at the instance of the heir-male of the marriage, as being granted in consequence of an unlawful promise, *contra fidem tabularum nuptialium*: For, tho' of itself it be a lawful and reasonable deed for a man to provide his brothers and sisters, and the bond must have stood, had it been granted *ex proprio motu*; yet where a man grants an obligation, conceiving himself bound where he is not, or led by a scruple of conscience to fulfil a promise, which ought not to have been exacted of him in these circumstances, and which the law reprobates, such obligation cannot be effectual. 8th February 1718, Pollock *contra* Campbell of Calder.

Pactum de non petendo.

A PERSON's escheat being gifted, and the donatar having promised to a debtor of the rebel's never to ask payment, and then retrocessing the rebel; the Lords found, That he, being reponed, could not be prejudged by any promise of the donatar. Spotiswood, (*Promise*) 20th March 1624, Mackieson *contra* Ramsay.

A CREDITOR in an assignation to a bond granted by divers *correi*, may provide, That the assigney is not to use execution against some of them, but this hinders not the creditor to seek the full debt from the rest, nor does it liberate the *correi*, in whose favour it was made, from a proportional relief. Gilmour, February 1665, M'Math *contra* Monteith. — The like. Marcus, (*Cautioners*) February 1685, Wolmet *contra* Fleming. — A *pactum de non petendo* made to a principal frees not the cautioner. Stair, 10th July 1680, Leitch *contra* Haderwick.

Pactum Illicitum.

A son can-
not be his fa-
ther's inter-
dictor, nor a
wife her hus-
band's.

A PARTY, in his contract of marriage, having consented that he should be only liferenter of some lands, and the children of the marriage fiars, and that for that end he should be interdicted to his father

father and father-in-law; after the decease of these two, who were to be the interdictors, the Lords refused to interdict him at the instance of his own son, apparent heir of the marriage, tho' the clause of interdiction was expressly insert in his favours. Durie, 18th January 1622, Ld. Silvertonhill *contra* his father. — A bond was granted by a husband to his wife, bearing, *That in respect of his facility, he might be induced to dispose of a liferent he had by her, therefore he obliges himself not to dispose thereof without his wife's consent*; upon which inhibition was used. The Lords refused to sustain this bond as equivalent to an interdiction. Here it was pled, That a man cannot interdict himself to his own wife, who being *sub potestate viri*, cannot be curator to any other, much less to her husband. Stair, 27th February 1663, Lady Milntoun *contra* Ld. Milntoun.

A BOND was sustained, whereby a coalhewer bound himself to serve a coal master for life, which was found neither *contra bonos mores* nor christian liberty. Auchinleck, (Bond) Durie, 24th March 1632, Ld. Caprington *contra* Geddie. — The tacksmen of the fish-boats belonging to the village of Johnshaven, entred into a contract with the masters and crews of several of these boats, whereby they became bound for the space of three nineteen years to pay to the tacksmen L. 44 Scots for each boat yearly; That during this time they were to be as *adscriptitii* or *vilani*, adstricted continually to their respective boats, so that not one of them, during all that time, could remove from the village of Johnshaven, or so much as from one boat to another: Two of the above fishers being under age when they sign'd the contract, raised a reduction thereof upon minority and lesion. The defence was, That there was no lesion, fishing being the pursuer's trade, and which, should they be loosed from this contract, they would follow under some other master, or in some other place. This contract was notwithstanding reduced, as being too great a restraint upon natural liberty. December 1728, Allan and Mearns *contra* Skeen of That-Ilk and Burnet of Mountboddie. — Paction of perpetual banishment in lieu of assythment for slaughter, was found unlawful without the King's consent. Haddington, 6th March 1612, Wedderburn *contra* Monorgun. — Carmichael and Stalker entred into a copartnery of bookselling within the city of Glasgow, to continue for three years, and because the place was judged too narrow for two Booksellers at a time, it was stipulated, *That after the expiry of the three years, either of them refusing to enter into a new contract upon the former terms, should be debarred from any concern in bookselling within the city of Glasgow*; in a reduction of the contract, the Lords found the debarring clause in the contract is a lawful paction, and not contrary to the common liberty of the subject. 15th January 1735, Stalker *contra* Carmichael.

VICTUAL once presented to the mercat, being thereafter housed, the Lords found, That if any forestaller buy it betwixt mercat days, the magistrates may escheat it, without incurring spuilzie. Haddington, December 1594, Ld. Merton *contra* Town of Lawder.

A TUTOR-IN-LAW having, by the advice and arbitration of friends, granted a factory to the pupil's mother, who, on that account, gave him a bond for a considerable sum; the Lords reprobated this transaction.

Pactum contra libertatem.

Forstalling the mercat.

Parents, tutors, &c. taking money under the name of a gratification.

on, and suspended the charge for the sum *simpliciter*, as being an unlawful paction. For tho' a tutor may constitute a factor, and appoint him a reasonable salary, yet he ought not to take money himself, nor make profit of any engagements he enters into upon the pupil's account. Durie, *penult.* February 1639, *Musket contra Dog.* — A bond was found null, because granted by a woman to one who had been her curator, who had all her writs, and had refused to deliver them up till he got the bond, which was found a *turpis causa*. Nicolson, (*Turpis causa*) 24th July 1634, *Rossie contra* her curators. — An interdictor should take no profit for consenting to any block of land pertaining to the interdicted person, and therefore a bond granted by the purchaser to the interdictor for 500 merks, was found null. Haddington, *penult.* July 1622, *Carnoufie contra* Achanachie. — A husband granted bond to his wife's mother sometime before the marriage, bearing to be for expences waired out by the mother upon her daughter, with a clause, *That if the intended marriage took not effect, the bond should be null*: This bond was not sustained alone without an astruction of equivalent expence; for it is *contra bonos mores* for parents, tutors, &c. who are bound to do the best they can for those under their protection, to take any thing in name of gratification, which would be an encouragement to betray their trust, and to sell their pupils to the most undeserving. Stair, 23d June 1680, *Hamilton contra* Borthwick. — A man being charged for the sum in a bond due by him to his wife's brother, granted at the time of the marriage, and alledged to be for obtaining his consent thereto, which is *turpis causa*, being dated betwixt the contract and solemnizing of the marriage; the Lords nevertheless sustained the bond against the husband that granted it. Fountainhall, 3d July 1696, *Johnston contra* Murray.

Gratuity
taken from a
debtor.

It was found that one might not take any gift from his debtor, except it were in remuneration, or for some special favour or beneficence distinct from the debt; for indigent debtors not being able to make present payment, would be drawn to make presents, by way of favour, to gain delay from their creditors, which might soon run up to double interest. Stair, 2d January 1677, *Nisbet contra* Ld. Humble. — An assignation to a tack was reduced, being granted of the same date with a bond of borrowed money, and acknowledged in the party's oath to have had no other onerous cause. Fountainhall, 20th June 1696, *Sutherland contra* Sinclair. — A man press'd with many personal debts, thought proper to borrow a considerable sum upon heritable security for discharging of these debts; at the same time there was a separate bargain entred into betwixt him and the creditor who advanced his money, by which it was covenanted, That in case at any time thereafter he should have occasion to sell the lands, he must dispone them to his said creditor, upon payment of a price condescended on: For what appeared to the Lords, the price was adequate, and according to the current rate for the time, yet they found the paction of sale to be *contra bonos mores*, and reduced the same. 30th November 1736, *Brown of Carluith contra* Muir.

Taking a
gratification
to become cau-
tioner.

THE Lords found a cautioner his taking bond from the principal debtor, for a sum of money, as a reward for becoming cautioner for him

him, was *contra bonos mores*, and therefore annulled the bond: Forbes, 24th, Fountainhall; 27th January 1711; King *contra* Ker.

A BOND granted by a man to a woman, and a child procreated betwixt them in adultery, was found null by exception, as being granted *ob turpem causam*. Haddington; Hope; (*Obligations*) 20th July 1622, Durham *contra* Ld. Blackwood. — But the contrary was found thereafter. Durie, 25th June 1642, Ross *contra* Robertson. — An assignation by an adulteress to her adulterous son, was not found null on that score, at the instance of the cedent's executor *qua* nearest of kin, the act 119, Parl. 1592; relating only to dispositions of heretage. Forbes, 7th March 1707, Dr. Irvine *contra* Skeen.

Bond granted causa adulterii.

SOME part of the things prestable on the bridegroom's father's side, viz. to possess his son in a certain number of chalders of victual, being remitted by the bridegroom himself on the very day of the contract, by a private transaction betwixt his father and him; this was found *contra bonos mores*, & *fidem tabularum nuptialium*, and therefore declared null. Spotiswood, (*Marriage*) December 1633, Hepburn *contra* Seton. — But the son long after the marriage having voluntarily come to his father, and promised to adhere to the former bargain; the Lords, in regard he prejudged none thereby but himself, and that his promise could not bind his wife, found this relevant to be proved by his oath. Spotiswood, (*Marriage*) 15th January 1634, *inter eosdem*. — In a son's contract of marriage, the father disposed to him his estate, and the tocher was payable to the father, which he accepted for satisfaction of what debt was upon his estate, and for provisions to his younger children, the son having thereafter granted bond for a certain sum to the father privately before the marriage, it was reduced at the wife's instance, as *contra fidem tabularum nuptialium*. Stair, 21st July 1668, Paton *contra* Paton. — An eldest son, to whom, in his contract of marriage, the father became bound to make over the substance of his effects, having, before solemnization, been led privately to make a deed, enabling his father to burden the subjects contained in the contract with certain provisions in favours of his younger children; the Lords, at the instance of the heir of the marriage, reduced this deed, as in fraud of the contract, and found that it could not affect the special subjects contained in the contract, nor even the conquest during the marriage, which was also provided to the heirs of the marriage. Fountainhall, 21st June 1700, Dalrymple; 27th June 1701, Walker *contra* Walker. — In a contract of marriage, the man's father having bound himself to pay a sum to the husband and wife in conjunct-fee and liferent, and the father prevailing with the son to give him a clandestine discharge of the sum before the marriage; the Lords, in a pursuit at the relict's instance; as assigney by her husband, against her father-in-law for the same, thought that the taking a gratuitous discharge in such a manner, was an act against common honesty and morality, and therefore reduced it simply and *in totum*. Dalrymple, 21st, Fountainhall, 24th February, Forbes, 1st December 1705, Grieve *contra* Thomson. — A man having made over an estate to his eldest son, in his son's contract of marriage; warranting it to be worth 8000 Merks of yearly rent, and burdening his other estate with making the same good and effectual, did, before the marriage

Pactum contra fidem tabularum nuptialium.

marriage, take a discharge from the son of his said obligation. In a reduction of the discharge against the father's other representatives, to whom the separate estate was disposed, the pursuer's estate falling short of the rent at which it was warranted, the Lords reduced the discharge as *contra fidem*. Forbes, 28th January 1709, M'Guffock *contra* Blairs. — A father having disposed his whole estate in his son's contract of marriage, reserving an annuity to himself; but, before the marriage, having taken an obligation from the son to grant suitable provisions to the other children; the Lords found That in regard there was no obligation in the contract of marriage to relieve the son of the younger children's provisions, the bonds libelled, so far as rational provisions, were not granted *in fraudem pactorum*. Bruce's MS. 20th July 1716, Gordons *contra* Gordon, and 25th June 1717, *inter eosdem*. — Sir Hugh Campbell of Calder, in his son Sir Alexander's marriage-articles, became bound to provide his estate to his son, and the heirs male of the marriage, "free of all charge and burden," having reserved no power to provide younger children; he at the same time privately elicited from his son a promise to grant him a faculty of burdening the estate with L. 2000 *Sterl.* to his younger children, which promise Sir Alexander fulfilled about two years after the marriage, upon the narrative of the said promise, and that the marriage-articles had been entered into in compliance with the bride's friends and lawiers, that there might be no stop of the marriage; Sir Hugh having exercised this faculty granted him by his son, in a pursuit against the heirs of the marriage for payment of this sum, the Lords found, That the particular communing betwixt Sir Hugh and Sir Alexander before the marriage was in *fraudem pactorum nuptialium*; and seeing the bond was granted by Sir Alexander, tho' posterior to the marriage, on the narrative of the said prior communing; and that the marriage articles were only made and granted by Sir Hugh in compliance with the bride and her friends, therefore that the said bond was not binding on the heir-male of the marriage. 8th February 1718, Pollock *contra* Campbell of Calder. — In a similar case the bond of provision was reduced, tho' it did not go upon the narrative of a promise elicited from the granter before his marriage, but then it appeared, by a letter writ by the father to his correspondent along with his son's contract of marriage which he had sign'd, that he had given instructions to his correspondent not to deliver up the contract until he should get a private obligation from the son to grant the bond of provision to his brothers and sisters. 19th December 1739, Ruffel *contra* Gordon of Halhead.

A PARTY having given discharge of the tocher immediately after the contract of marriage, and the marriage having followed, and he pursuing exhibition of his said discharge, the Lords ordained the other party's oath to be taken, whether there was any real numeration of money; and if not, found the discharge null. Colvil, January 1577, Turnbull *contra* Hepburn. — The Lords refused to reduce a bond granted by a son, without the knowledge of his father, to his father-in-law, at the time of marrying his daughter, for diminution of the tocher, because the sum was small (being but the tenth part of the tocher) and the lesion inconsiderable. Gilmour, *ult.* June 1665, Kennedy *contra* Agnew. — But this was thereafter stop'd to be further heard. Stair, 27th July 1665, *inter eosdem*. — A discharge of part of the

the tocher before solemnization of the marriage, reduced, as *contra fidem tabularum nuptialium*, at the instance of the granter himself, who was minor, but without curators; because granted privately, without the concurrence of his friends, whom he had engaged to assist him in the marriage-treaty. Home, 22d November 1716, Viscount of Arbutnot *contra* Morison of Prestongrange.

IN a contract of marriage the wife having a power, in case of no heirs of the marriage, to make her tocher return to what person she should appoint; and she having named her husband, this nomination was sustained, tho' done after the contract and before solemnization; because this was not impinging upon the contract, but only exercising a faculty given by the contract. Stair, 23d January 1680, Home *contra* Homes.

A MAN selling to his brother-in-law his part of the goods which he might succeed to by the decease of his wife's father, the said father being on life; this, tho' *pactum super hereditate viventis*, was sustained, because the Roman law in this and the like cases, such as tailzies, renunciations of bairns part of gear, &c. takes no place in Scotland. Durie, Auchinleck, (*Buying and Selling*) 6th July 1630, Aikenhead *contra* Bothwell. — A disposition by a remoter heir, conveying to the disponent his hope of succession to an estate, when the nearer heir was yet and many years thereafter on life, was sustained, tho' it was alledged to be *pactum corvinum de hereditate viventis*. Fountainhall, 29th July 1708, Rag *contra* Brown.

A MEMBER of the college of justice, as trustee for the apparent heir, having purchased a debt due by the defunct, and thereupon adjudged the estate; and, after the process was at an end, having conveyed the adjudication to the apparent heir, retaining a fourth part of the estate as a gratuity to himself; the Lords sustained the transaction made after the process was at an end, and found, that it could not be considered as a *pactum de quota litis*. Stair, 24th February 1675, Home *contra* Nisbet. Stair, 23d July 1675, and 6th January 1676, *inter eosdem*. — An alledgeance of *pactum de quota litis* being proponed by the debtor against an Advocate assigney, the Lords inclined to sustain the nullity, tho' proponed by the debtor, and not by the cedent with whom the paction was made, and for proof of the paction ordained the assigney to depone in presence of his cedent; but reserved to themselves what it should operate. Stair, 23d June 1680, Ruthven *contra* Weir.

A MEMBER of the college of justice pursuing a spuilzie as assigney, the Lords sustained the action, notwithstanding the act of parliament anent buying pleas, because there was never any action intended upon the spuilzie at the cedent's own instance; and that the pursuer was not made assigney to an action, but to the deed of spoliation. Durie, 6th July 1625, Mouat *contra* M'Clellan. — A declarator being only executed, but never called, nor any process deduced thereupon, the Lords found, That the buying of the right in question by a member of the college of justice, was not buying of a litigious right, which came under the compass of the act of parliament. Durie, *penult.* July 1635; Richardson *contra* Sinclair.

MEMBERS of the college of justice are hinder'd to buy pleas, but not to take them in gift. Stair, 30th July 1678, Earl Home *contra* Home.

AN advocate buying a litigious subject, was found only to have lost his office, but not the action. Colvil, Coult *contra* Cunningham. Haddington, 5th June 1611, Cunningham *contra* Maxwell. Durie, *penult.* July 1635, Richardson *contra* Sinclair. Fountainhall, 20th December 1683, Purves *contra* Keith. Forbes MS. 15th December 1713, Home *contra* Earl Home.

Factors and agents purchasing in their constituents debts.

THE factor named by tutors can no more take the benefit of the pupil's debts purchased in by him, or of rights upon the pupil's estate, than the tutor himself can. Durie, 28th March 1632, Ld. Ludquhairn *contra* Ld. Haddow. — Factor bound to communicate cases; and it was even found, That a clause in a factory, giving liberty to a factor to purchase in claims against his constituent for his own behoof, was *contra bonos mores*, and void in law. Forbes, 16th June 1710, Murray *contra* Murray. — 'Tis *contra bonos mores*, and would be of dangerous consequence, to allow agents to purchase in debts against their constituents. Upon which footing, an agent was found obliged to accompt for cases to his constituent's heir and creditors. 15th January 1736, Corfan *contra* M'Gown.

Action for the price of run goods.

ACTION is competent for the price of run goods, tho bought as such. Home, 27th November 1723, Commissioners of the customs *contra* Morison.

Game-debt.

IN a pursuit for payment of a 6000 merks bond, alledged for the defender, that the money was won at dice within the space of twenty four hours, and so was not due by the 14 act, parl. 1621. Answered, The said act affords only a defence against payment when the money is pursued for, but here there is a bond of borrowed money. The Lords found it relevant *scripto* or *juramento*, that the bond was granted for money lost at play within twenty four hours to make the bond fall under the act of parliament. Marcus, (*Summons*) 19th July 1688, Straiton *contra* Ld. Craigmiller. — In the same cause it was found, That the money lost being paid, and immediately lent back on bond, tho' possibly the individual species lost was not lent, that this also fell under the act of parliament. *Ibid.*

Sponsiones ludicrae.

A PARTY having taken a piece of gold, under condition to pay back a greater sum in case he was ever married; in a pursuit for the same, objected, *sponsiones ludicrae* ought not to be allowed. The Lords sustained process. Dirleton, 9th February 1676, *contra*.

TUTORS or curators purchasing in the minor's debts. See Tutor and Pupil.

PACTUM PRIVATUM.

FOUND, That a relict marrying again had lost her office of tutory, altho' in the testament it was expressly provided, that she should continue in the office, even after her second marriage. Durie, 8th March 1636, Stewart *contra* Henderson. — The like, with respect to the custody of the pupil's person. Colvil, July 1586, Ld. Kerbechill *contra* Lady thereof.

PAPIST.

P A P I S T.

A PARTY having granted bond to his uncle, a Papist, for a great sum on trust, to lead an adjudication thereupon against his own estate; and it being acknowledged on all hands, that it was for a Protestant's behoof, and that the Papist's name was only borrowed; yet the Lords, resolving to keep strictly by the act of parliament 1700, found the adjudication null. Forbes, 21st, Fountainhall, 25th July 1710, Creditors of Tarrauchly *contra* Maxwell.

IN a question, whether a profess'd Papist may dispoise his heretable jurisdictions irredeemably to a Protestant, or if the disposal of them accresced to the Sovereign; the Lords found, That he might dispoise them. Fountainhall, 22d July 1707, Marquis of Annandale *contra* Duke of Queensberry.

IN a ranking, it being objected against an adjudication, That it proceeded upon bills and promissory notes granted by the common debtor, who was a profess'd Papist, and therefore null upon the 26 act, parl. 1695; it was answered, That the act does only concern gratuitous deeds or dispositions; but neither the words nor meaning of the act do bar Papists from trade or commerce; and as this is a penal law, it is strictly to be interpreted. The Lords repelled the objection. 14th February 1739, Sidney *contra* Maxwell of Orchardton.

PARENT and CHILD.

A FATHER being pursued for a sum furnished to his son, whom the father alledged to be forisfamiliar, in so far as he was entering advocate; the Lords found, That he was bound to have alimented his son according to his quality and estate, so far as the son could not entertain himself by his own industry, and that he was not totally forisfamiliar; and therefore ordained the pursuer to prove that the sum was furnished for aliment, as also the extent of the father's estate, that so they might modify accordingly. Fountainhall, 20th December 1678, Strachan *contra* Stewart. — Tho' by the Roman law the father was bound to tocher his daughter, yet the Lords found it otherwise by the law of Scotland. Falconer, 27th November 1685, Robertson *contra* her father's heirs.

Parents bound to aliment, but not to tocher their children.

IF parents may name tutors and curators to their children? See Tutor and Pupil.

FURNISHING made to children, is the father liable? See Recompence.

ARE the children liable? Ibid.

PART and PERTINENT.

INFEFTMENT in a barony carries a burgh of barony as part and pertinent, tho' not exprest; for tho' in an infeftment of an ordinary

ordinary holding, mills, fortalices, salmon fishing, and burghs of barony, cannot be conveyed under the name of part and pertinent; yet in *baronia*, which is *nomen universitatis*, they are all carried without being exprest. Stair, 15th January 1668, Earl of Argyle *contra* Campbell.

A FORTALICE requires exprest infeftment, but a manour place requires no exprest infeftment. Haddington, 16th June 1612, Home *contra* Home.

A DIAL fixed on a standard in a garden, was found to be comprehended under part and pertinent in an heretable disposition of *lands, houses, yards, with their pertinents*, as pertinent of the garden. Haddington, 7th February 1624, Nisbet *contra* King. — An abbay-place being mentioned in a tack, not only the houses, but all within the precincts found thereby understood. Colvil, November 1591, Commendator of Newabbay *contra* Tenants.

IN a removing the Lords found in general, That land might be pertinent of another land, altho' it was no part thereof, or which is the same thing, That discontiguity makes not land cease to be part and pertinent. Durie, 1st March 1632, Forsyth *contra* Durie. — The like. Durie, 14th July 1627, Lady Boyne *contra* her tenants; and 18th July 1628, Ld. Lugton *contra* Somervell. — A separate tenement may become part and pertinent of another tenement by long possession. Stair, 17th November 1671, Young *contra* Carmichael. Stair, 20th February 1675, Countess of Murray *contra* Weemyfs.

Two persons competing about a seat in the church, the first founding upon a disposition from the former possessor, from whom he had bought some acres to which the seat pertained, but the disposition not mentioning any seat; and the other claiming it in virtue of a posterior disposition to the seat *per expessum*, and also to the mansion-house, upon this narrative, *That the prior disposition made no special mention of the seat*; the Lords found it comprehended under the first disposition, and that neither in seats churches nor burial-places were so *inter res sacras & religiosas*, as to be *extra commercium*, but were conveyable by infeftments, and affectable by creditors. Fountainhall, 15th January 1697, Lithgow *contra* Wilkiefon. But in the like case preferred the latter to the right of the seat. Fountainhall, 10th November 1698, *inter eosdem*.

IF a mill will be carried as part and pertinent. See Mill.

PASSIVE TITLE.

Behaviour as heir.

Relates only
to the appa-
rent heir.

BEHAVIOUR not inferred from a second son's selling land belonging to his father, tho' his eldest brother was an idiot declared, and he was his curator, and had got the price, and his elder brother was deceased at the commencement of the process. Durie, 21st December 1626, Irvine *contra* Ld. Monimusk. — An apparent heir was not subjected to the passive title of behaviour, by granting a factory to one to uplift the rents of lands, when his father's whole estate was provided to a liferenter, and to the children of a second marriage. Falconer,

coner, Marcus, (*Airs*) 28th November 1682, Stamfield *contra* Earl Middleton.

AN apparent heir intrometting with the rents of lands apprised from the defunct, but the legal not expired, this was found a behaviour. *Stair*, 21st February 1663, *Hamilton contra Hamilton*. — The same. *Stair*, *eod. die*, *Stirling contra Campbell*. — But where the appriser was infest and in possession, and the defunct not in possession, the apparent heir's intromission with the rents was found not *gestio pro haerede*. *Stair*, 11th July 1671, *Maxwell contra Maxwell*. — The Lords found, That a party's intromission with the rents of lands, wherein his father died infest, and in possession, did infer a behaviour as heir against him, tho' the father was denuded by expired comprisings before his decease. *Home*, January 1684, *Gibson contra Grant*. — It was found a behaviour in the apparent heir to intromet with the rents of lands, which had been wadset by the defunct, but which were redeemed by him, and in his possession at the time of his death, tho' there was no declarator upon the redemption. *Stair* 21st February 1663, *Hamilton contra Hamilton*.

Intromission with the predecessor's rents, is a behaviour, and what understood to be the predecessor's rents.

INTROMISSION by an apparent heir with the rents of a subject, whereof his father died in possession, found not to infer behaviour, it being afterwards understood that the defunct had no right to the subject, but a third party to whom the apparent heir behoved to account for his intromissions; and therefore the creditors were not prejudged by the apparent heir's intromission with a subject which did not belong to their debtor. *Durie*, 22d March 1628, *Farquhar contra Campbell*.

THE heir apparent found liable, because he had lien in the defunct's bed, drunk in his mazer cup, wore his silk hose, &c. *Durie*, 15th January 1630, *Cleghorn contra Fairly*. — An heir's intromission with the whole silver-work is a behaviour as heir, since therein is comprehended the best of the kind which is the heirship. *Stair*, 21st February 1663, *Stirling contra Campbell*.

Intromission with the heirship moveables is a behaviour. And, 1mo, What sort of intromission relevant?

IN a pursuit upon the passive titles, where the defender's intromission was with a bed, board, caldron, and a pot which he had gifted away; the Lords, in respect the particulars disposed upon were but of small importance, and that the claim was laid upon an old decret of spuilzie, not heard of for 36 years, found the intromission probable *scripto vel juramento* only. *Durie*, 6th, *Spotiswood*, (*Ejection*) 7th November 1622, *Ld. Dundas contra Hamilton*.

2do, What if the particulars be of small value?

THE heir was found liable upon the passive title behaviour, for making use of his father's table, stand-bed and ambry, standing in a house liferented by the father, the fee of which was in the defender; tho' he did no more but take possession of them along with the house, and disposed of none of them: But the Lords found, That he ought to have made an inventory of the goods by the authority of a judge, to be made forthcoming to all parties having interest, if he intended not to be heir. *Haddington*, 8th March 1610, *Baillie contra Home*. — The like, where the apparent heir continued in possession of the heirship for two years, without making inventory. *Durie*, 14th July 1626, *Johnston contra Mason*. — Behaviour inferred from an heir's retaining the possession of the best bason and silver spoons, and timber beds and boards belonging to the predecessor, and using the same for five years

3tio, What if intromission was commenced by him not as apparent heir?

after the predecessor's decease, albeit his first intromission was as tutor to the defunct his brother, who had been declared idiot; and he offered to restore the goods in as good condition as at his brother's death, not having disposed of any part thereof, in regard he had continued the possession so long without applying to the Lords, and craving inventory to be made of the goods; which he ought to have done, if he had no mind to be heir. Durie, Spotiswood, (*Heir*) Hope, (*Heir*) 17th January 1627, Frazer *contra* Ld. Monimusk. Auchinleck, (*Heir*) 16th January 1631, *inter eosdem*. — An apparent heir being conveyed for intrometting with heirship moveables, which intromission was begun when he was not apparent heir, but was continued after he became apparent heir by the death of him who was apparent heir at the time of the intromission; this was found not to be a behaviour as heir. Durie, 2d July 1629, Cuninghame *contra* Moutray.

4th, What if
the predecess-
or died at the
horn?

WHERE the predecessor died at the horn, his escheat gifted and declared, the apparent heir's intromission, after the declarator, with moveables that were in the defunct's possession, does not infer behaviour; because it is not intrometting with his predecessor's goods, but with what belongs to the donatar of escheat, and which intromission therefore can be of no prejudice to the predecessor's creditors. Durie, 27th January 1636, Straiton *contra* Chirnside. Stair, 26th February 1663, Cuthbert *contra* Monro. Stair, 22d December 1674, Seaton *contra* Seaton. — But it was found no defence to the apparent heir intrometting with the heirship moveables, that his father died at the horn, unless his escheat had been gifted and declared before intromission; for tho' vitious intromission, which is a penal passive title, be purgeable by a declarator obtained of the defunct's escheat, provided it be before intending of the process upon vitious intromission, whereby the intrometter becomes debtor to the donatar only, and not to the defunct's creditors; behaviour, which is *animi*, stands upon a different footing; it is enough to infer the *animus immiscendi*, that the heirship moveables were in *hereditate jacente* of the defunct at the time of the intromission. Haddington, 9th July 1607, Granger *contra* Granger. Stair, 10th June 1663, Gordon *contra* Leith. — The apparent heir having entred into possession of the heirship goods upon inventory by a warrant from a judge, the Lords found his further intromission with goods not contained in the inventory, not relevant to make him liable, *quia absuit animus gerendi*. Hope, (*Heir*) 27th February 1618, Falside *contra* Lady Ogilvie. — But in the like case the contrary was afterwards found, That the super-intromission did infer the passive title. Durie, 14th February 1629, Steven *contra* Paterson.

Intromet-
ting with the
predecessor's
writs.

BARE intromission with evidents, no other deed being done thereon, was not sustained to the effect of behaviour. Durie, 8th July 1628, Dunbar *contra* Leslie. — Intromission with the charter-chest, but not upon inventory, and keeping the same two years, was found to infer *gestionem*, altho' the apparent heir gave bond to be accomptable, and had never any benefit by, nor intromission with the estate. Gofford, 28th June 1670, Elies *contra* Carse. — The apparent heiress and her husband, mean persons, having received from the defunct's writer the writs and evidents of his real estate upon inventory, for which they granted receipt; the Lords, in this case of poor ignorant people

people who made no use of these papers, assoilzied from the passive title. Fountainhall, 15th June 1706, Diggles *contra* Stewarts. — Intromission with the defunct's writs being referred to the apparent heir's oath, he deponed, he meddled with no papers but what were his own, in consequence of an assignation made to him by the defunct of his personal estate; this was found not to infer behaviour, tho' the defender in his oath owned his entering the closet where the defunct's writs lay, without either the presence or warrant of a judge. Fountainhall, 28th January 1698, Earl Airly *contra* Sharp. — In the like case, the defender deponing, That being put in the fee of his father's estate at his age of six years, he meddled with no other papers in the charter-chest but what concerned the lands disposed to him; the Lords thought this differ'd from the former case, a charter-chest being *nomen universitatis*, and so found him liable. Fountainhall, 26th February 1698, Murray *contra* Blair. — The defender upon oath having own'd, "That having got the key of the defunct's room from a friend, which the defunct had desired to be delivered to him, he went in several times, both alone and in company, and viewed the papers therein contained, because the defunct had disposed to him several funds and subjects, but that he intromitted with no writs save those disposed to him;" the Lords found, That his accepting of the key, and taking the papers to which he was specially assigned, did not infer behaviour. But the author adds, the Lords were convinced, it was of dangerous consequence to allow of such intromissions, which well deserved to be regulated by an act of federunt. Fountainhall, 25th January 1709, Chalmers *contra* Sharp.

THE apparent heir having given back a contract of wadset, upon which his father had not advanced any money, and having taken a new one in his own name; this was found a behaviour, tho' he himself advanced the wadset sum. Marcus, (*Airs*) November, Home,

December 1684, Trotter *contra* Scot. — The same was found, where the apparent heir intermeddled with a tack of teinds belonging to his predecessor, gave it back to the titular, and took a new one in his own name, Fountainhall, 26th January 1687, Jolly *contra* Viscount Kenmuir. — In like manner, an appriiser having executed a renunciation of his right in favours of the debtor, which he kept in his own custody till his death, the apparent heir's intermeddling with the same, and giving it up to the debtor in prospect of gain, was found a behaviour. Fountainhall, 23d July 1701, Baillie *contra* Chancellor.

THE Lords found the heir's intermeddling with the writs of his predecessor's lands a behaviour, tho' the lands had been apprifed from the predecessor, and the legal expired before his death; but they thought it dangerous to allow apparent heirs to put their hands among the defunct's writs, who would thereby have an opportunity, by abstracting evidents, to endanger the diligence of creditors. Marcus, (*Airs*) 16th February 1682, Ld. Coxton *contra* Duff of Drummuir.

THE Lords refused to sustain a husband's intromission to bind behaviour upon his wife, as heir to her father. Fountainhall, 15th January 1680, Dingwall *contra* Irvine. — The Lords were clear to find the husband's intromission with the rents of the estate, of which his wife was apparent heir, a behaviour, so as to subject her universally

Husband's
intromission
in name of his
wife.

to her predecessor's creditors; seeing husband and wife are *una persona in jure*, and his intromission in her right must be understood to be her intromission. But in this case, the husband's intromissions being sufficient to answer the creditor pursuing, no more was demanded than to make him liable *in valorem*. Fountainhall, 17th December 1703, Home of Linthill *contra* Dickson.

Behaviour
not infer'd, if
the intromissi-
on can be as-
cribed to a
singular title.

THIS defence against an heir's intromission, *viz.* That the father's relict had a liferent tack of the lands, and by her tolerance he intromitted, was found relevant. Durie, 8th July 1628, Dunbar *contra* Leslie. — The condescence of behaviour as heir, by intromission with the mails and duties, was elided, the apparent heir having possessed by a warrant and tolerance from the donatar of recognition; for tho' the gift of recognition was no proper title to possess, it not being declared, yet it sufficiently shewed the *animus* of the heir, not to behave as heir, who intromitted by this singular title. Stair, 17th July 1666, Ogilvie *contra* Lord Gray. — An apparent heir having purchased in an apprising deduced against his predecessor, his intromission upon that singular title was found not to infer behaviour, tho' the legal was not expired. Dirleton, 16th December 1666, Allan *contra* Campbell. Gosford, 22d January 1675, Chalmers *contra* Farquarson of Inveray. — The like, where the apprising was led against the apparent heir himself, upon his predecessor's bond. Gilmour, 8th, Stair, 10th January 1662, Barclay *contra* Ld. Cragievar. And this was found, tho' the apparent heir intromitted with more than satisfied the apprising. Stair, 26th February 1663, Cuthbert *contra* Monro. — Intromission with the defunct's rents was found a behaviour in his son the apparent heir, tho' he founded upon a precept of *clare constat*, as heir to his grand-father, to which he pretended to ascribe his intromissions; which was not sustained, because, having his father's writs in his hands, he could not be ignorant of his father's infestment; and his procuring the precept of *clare constat* as heir to his grand-father, which he knew to be null, was but a mere pretext to immix himself in his father's heretage, without representing him according to law. Stair, 23d November 1671, Rorison *contra* Sinclair. — The like. Home, January 1685, Maxwell *contra* Corfan.

A DISPOSITION by the father to the son, tho' in the father's custody at his death, he having lived *in familia* with his son, did liberate the son when pursued as intrometter with his father's heirship moveables. Durie, 30th January 1630, Calderwood *contra* Porteous. — The heirship being confirmed promiscuously with the rest of the moveables, and the apparent heir having right from the executor, the confirmation, tho' not effectual to carry the heirship, was founded upon as a colourable title to shew that the apparent heir had not *animus immiscendi*, since he meddled by a singular title. This was repelled, it being offered to be proved, that the executor was the apparent heir's own servant, confirmed for the apparent heir's behoof. Stair, 10th June 1663, Gordon *contra* Leith. Durie, Spotswood, (Heir) 16th December 1630, relict of Ker *contra* Ker. — A man who had two dispositions from his father, the one of heretage, the other of moveables, having, without warrant, intromitted with the heirship moveables, judging these to be comprehended under one of the two, tho' not named; the Lords found that the moveable heirship

ship was a separate subject, and not being expressly convey'd, that his intromission therewith made him liable *passive*. Fountainhall, 1st July 1707, Inglis *contra* Elphinston.

AN apparent heir having disposed his father's lands, taking the dis-
pensee bound to relieve him of debts, for which the disensee granted him bond for a certain sum; this was found a behaviour, tho' nothing followed thereupon, neither the apparent heir infest, nor the bond paid. Stair, 30th July 1672, Foulis *contra* Forbeses.

Disposing
the heritage a
behaviour.

AN estate being provided, in a contract of marriage, to heirs-male, and there being only daughters of the marriage, who, after the father's decease, renounced their interest in favours of the heirs-male, upon a valuable consideration; this was not found a behaviour, seeing they had not disposed or discharged any thing they could succeed to, but only got a sum from the heir-male in way of gratuity, to grant a renunciation voluntarily, which they could have been compelled to grant in law; and here the creditors were not at all prejudged. Gilmour, June, Newbyth, Stair, 5th July 1666, Scot *contra* heirs of line of Auchinleck. — An apparent heir, after his predecessor's decease, having ratified a death-bed disposition, the Lords found, That his getting a valuable consideration for his consent did not make him liable, seeing he had done no deed tending to convey any right in the defunct, which might have been affected by the creditors; and the heir's privilege of challenging a death-bed deed is purely personal. Stair, 19th July 1676, Nevoy *contra* Lord Balmerino — As little will the presumptive heir's renouncing in his father's favours his interest in the heirship moveables, import a behaviour, tho' he get a valuable consideration therefor. Durie, 24th February 1636, Ld. Meidhope *contra* Hepburns. — An apparent heir having, in a transaction, ratified an apprising led against his predecessor, and renounced the benefit of the legal, this was found a behaviour; for it was giving away the defunct's right of reversion to the disappointment of the creditors, who had no access thereafter to redeem the apprising. Durie, 10th February 1642 Johnston *contra* Johnston. — An adjudger having, after the legal was expired, sold a part of the lands, giving warrandice only from fact and deed; and because his right was doubted by the purchaser, the apparent heir of the debtor, obliging himself to deliver to the purchaser the writs of the lands to purge incumbrances, and to give absolute warrandice, whereby it was contended, that he was really the disposer, and the adjudger only a bare name; the Lords found, That the apparent heir's granting the bond of the tenor aforesaid, imported a behaviour; but, on a reclaiming bill, their Lordships ordained the case to be further heard. Fountainhall, 28th June 1711, Dick *contra* Carstairs.

Discharging
or renouncing
any right com-
petent to him.

A FEU-CHARTER granted to a young man, in contemplation, that his father and predecessors had, past all memory, been kindly rental-
lers in that land, was found not to infer a behaviour, tho' it was pled, That it was upon his father's account he got this benefit. Fountain-
hall, 13th December 1698, Moffat *contra* Atchison.

Obtaining a
charter of
lands, where-
in the defunct
had an interest.

Pursuing for
an aliment.

AN apparent heir of ward-lands, who gets an aliment modified to him in terms of act 25, parl. 1491, is thereby subjected to the passive titles, because his claim is not *super jure naturæ*, but as heir. Haddington, 20th November 1610, Master of Boyd *contra* Lord Campbell. Durie, 12th February 1635, Hepburn *contra* Seaton.

Assuming
his predecessor's
title.

AN apparent heir of a Nobleman assuming his predecessor's titles, is not a behaviour. Erskine, 25th March 1622, Lord Semple *contra* Hay. — The Lords found a peerage and office of Marshal was annexed to the blood, and not *in commercio*, and that the using the title, and exercising the office made no passive title. Marcus, (*Airs*) 2d February 1682, Bowar of Kilmidrum *contra* Earl Marishall.

Proposing
a defence of
payment.

PROPOSING a defence of payment, is not such a *gestio*, as to make the defender liable in any other process. Auchinleck, (*Heir*) Spotiswood, (*Heir*) Durie, 16th July 1629, Murray *contra* Ross. Spotiswood, (*Heir*) 10th July 1630, Whitlaw *contra* Ruthven. Spotiswood, (*Heir*) 26th January 1631, Chalmers *contra* Boswell. Dirleton, 20th, Stair, Gosford, 21st January 1675, Telfer *contra* Corfan.

Founding a
defence upon
the predecessor's
evident.

A DISPOSITION being granted upon death-bed in prejudice of the apparent heir, but with this condition, That the dispoinee should denude in favours of the children of the apparent heir, whenever they should exist; and the apparent heir granting a trust bond, in order to have the subject adjudged from him as representing the defunct, and getting a backbond, obliging the trustee to denude of the adjudication to him, the apparent heir, in liferent, and his children in fee; and in a process, at the instance of these children, against the death-bed dispoinee, to denude in their favours, in terms of the above condition, the trustee appearing and objecting, That the disposition was on death-bed, and consequently null, which the children debarr'd him from pleading, in regard he had no other interest than as trustee aforesaid, verifi'd by the backbond granted to their defunct father: It was found, That the said children, pleading thus upon their predecessor's evident, not as giving them a right, but to shew that the trustee had no right to compete, did not infer the passive title of behaviour, nor did so much as subject them *in valorem*. Home, July 1717, Wilson *contra* Heirs of Short.

Paying his
predecessor's
debts.

BEHAVIOUR was not sustained upon the defender's paying divers of his father's debts after his decease. Durie, Auchinleck, (*Heir*) 26th January 1628, Commissary of Dunkeld *contra* Abercromby. — An apparent heir's making payment of the duties contained in a backtack, set by a wadsetter to his predecessor, was found to have thereby behaved as heir. Auchinleck, (*Heir*) Spotiswood, (*Heir*) 14th February 1629, Douglas *contra* Lawson.

AN apparent heir being conven'd upon this *medium*, That by a letter to the defunct's debtor he desired him to pay what he owed the defunct to one of his, the defunct's, creditors, and obliged himself to warrant the payment; and it being urged, That an apparent heir's uplifting heritable debts to pay the defunct's debt is a behaviour, and any body's uplifting of moveable debts for such an end is vitious intromission, and the appointing of a debtor to apply the payment such a way, is equivalent to

to the so uplifting and applying. Answered for the defender, intromission only with something in the defunct's possession at his death, doth infer a passive title, which cannot be charged upon the defender, who did not intromet with or give up the debtor's bond, or discharge the debt, but only interposed with the debtor to satisfy such a creditor, by obliging himself to warrant the payment; and the money paid was not the defunct's, seeing the debtor remained bound after the payment as much as before. The Lords assilzied from the passive title. *Harcus, (Heirs) 16th December 1682, Thomson contra Anderson.*

A SERVICE found sufficient to verify the defender to be heir *passive*, tho' it was not retoured to the chancery. *Haddington, 26th November 1594. contra . Durie, 7th December 1621, Clark contra Ld. Balgony. Durie, 16th February 1627, Simpson contra Ld. Balgony.* — A sentence and ward of court within burgh, whereby the defender was recognised, by testimony of witnesses, to be eldest son and heir to the defunct, was found not to prove him heir *passive*, seeing there was no *saime* following upon it. *Durie, 22d November 1628, Goodlet contra Adamson.* — The taking out brieves from the chancery in order to serve heir, was found not a behaviour, the same not having been followed out. *Stair, Gosford, 28th June 1670, Eleis contra Carse.*

Serving heir inchoated, but not completed.

THE passive title was not sustained upon the person his having, in a writ, design'd himself as heir, and professed himself to be heir, not being *in re hæreditaria*. *Durie, 24th January 1627, Ld. Glenkindie contra Crawford. Durie, 8th July 1628, Dunbar contra Leslie.*

Designing himself heir in writs.

AN apparent heir having granted a simulate bond, in order to lead an adjudication of his predecessor's estate; his intromission, by virtue of this title, was not reckoned a *behaviour*, being *singulari titulo*, and not as heir. *Stair, Gilmour, 22d January 1662, Glendinning contra Earl Nithsdale.* — But upon this occasion the Lords published an act of federunt, 28th February 1662, declaring, "That it should be *gestio pro hærede* to intromet upon such simulate title, whether the apprising was expired or not." This act was extended to intromission had in virtue of an apprising, led upon the apparent heir's just and true debt, contracted by him before he became apparent heir, without any view to be the foundation of an apprising against the predecessor's estate. *Stair, 19th July 1676, Nevoy contra Lord Balmerino. Stair, Dirleton, 13th December 1676, inter eosdem.* — An apprising led upon the debt of the apparent heir, whether real or simulate, does not infer behaviour, unless the apparent heir go on to intromet upon that title; yet, in a question with the defunct's creditors, the apparent heir, tho' he intromet not, is liable to them to the extent of his own debts affecting the estate; at least, he ought to purge the apprising, to the effect the defunct's creditors may have access to the defunct's estate, without being incumbered with the apparent heir's debts. *Falconer, 3d November 1682, Blyth contra Lawson.* — And the apparent heir being charged to enter, was not allowed to renounce, till he should first so purge the estate. *Stair, Dirleton, 8th November 1676, Jeffray contra Murray.*

Behaviour upon act of federunt 1662.

Behaviour
upon act 1695.

By act 24, parl. 1695, it is enacted, " That if any apparent heir shall either enter to possess his predecessor's estate, or shall purchase any right thereto, or any right affecting the same, whether redeemable or irredeemable, otherwise than as the highest offerer at a public sale, his foresaid possession, or purchase, shall be reputed a behaviour as heir, and an universal passive title." This clause was extended to purchases made during the life of the predecessor; tho' it was urged, that the character of apparent heir commences no sooner than upon the predecessor's decease. Fountainhall, Forbes, 7th June 1710, Watson *contra* Brown. — The like, with regard to a disposition in favours of the eldest son, reserving the granter's liferent. Dalrymple, 24th November 1714, Mercer *contra* Leith.

Behaviour
how purged-
able?

AN apparent heir's intromission with the heirship moveables of his predecessor who died at the horn, which infers behaviour, the gift of escheat not being declared before intromission, was found not purged by the declarator of escheat, afterwards obtained and purchased in by him before the process was moved against him upon the passive titles: For, having once behaved as heir by intromission with the heirship, there was a *jus quæsitum* to the creditors, which no posterior step taken by the apparent heir could deprive them of. Spotiswood, (*Heirs*) 15th February 1633, Bane *contra* Mitchel. — But in the progress of our law, as this passive title came to be considered like vitious intromission, a penalty upon the heir for defrauding creditors, rather than a proper *gestio pro hærede*; it was found, That if the declarator of escheat is obtained before the heir is attacked upon his intromission, this is relevant to purge the behaviour. And indeed there is reason for the opinion, seeing the creditors cannot justly quarrel the heir's intromission with moveables, which would not have belonged to them, but to the donatar of escheat, tho' he had not intromitted. Stair, 10th June 1674, Lady Spencerfield *contra* Hamilton. — And upon the same footing it was found, That the apparent heir's intromission with the heirship moveables, was purged, he having obtained before intending of the cause a gift of his father's escheat, which did not need declarator, because one cannot declare against himself. Stair, Dirleton, 10th February 1676, Grant *contra* Grant.

INTROMISSION with heirship goods found purged by the heir's obtaining warrant from the Lords direct to the Bailies of Edinburgh, to make inventory of the goods in his father's house; and which inventory was accordingly made before process against him at the instance of his father's creditors. Durie, 14th February 1629, Steven *contra* Paterfon.

AN apparent heir having subjected himself to the passive title of behaviour, by intrometting at his own hand with his predecessor's writs and evidents, and having thereafter within year and day entred heir *cum beneficio inventarii*, he pleaded, That the passive title of behaviour was purged by his entring heir *cum beneficio*, just as vitious intromission is purged by a posterior confirmation. Answered, The act 1695 gives not the benefit of inventory to those who have had any prior intromission with the defunct's estate, and therefore the heir cannot plead upon his inventory. The Lords repelled the defence. 14th November 1723, Wilkieson *contra* Alves.

Lucrative

Lucrative Successor *post contractum debitum*.

THE Lords found, That a charter granted to an heir, of the lands whereof his father was heretor before the said charter, flowing from no deed done by the father to the son, but proceeding upon another party's resignation in favours of the son, having no dependence on or relation to the father's right, made not the son to be lucrative successor to the father in these lands. Durie, 8th July 1628, Dunbar *contra* Leslie.

The disposition must flow from the father.

A DISPOSITION to a younger son makes him not lucrative successor, because he is not *alioqui successurus*. Stair, 28th February 1662, Hamilton *contra* M'Farlan. --- A disposition from one brother to another makes not the disponente lucrative successor, seeing the disponent has *hæredes propinquiores in spe*. Stair, Gilmour, 22d November 1665, Scot *contra* Boswel. Stair, Gosford, 17th December 1672, Lady Spencerfield *contra* Ld. Kilbrachmont. Stair, 22d December 1674, heirs portioners of Seaton *contra* Seaton. Lands which were tailzied to heirs-male, which failing to the King, being disposed to the heir of line, were found not to make her liable to the disponent's debts as successor *titulo lucrativo*. Gosford, 10th July 1668, Stewart *contra* Dennistouns. --- A younger son was found lucrative successor accepting and using a disposition of his father's lands, wherein he would have succeeded as heir of a marriage. Stair, 22d February 1681, More *contra* Ferguson. Dalrymple, 16th November 1698, Elliot *contra* Elliot. --- One of three heirs portioners, *sciz.* the only daughter of a second marriage, by accepting of a gratuitous disposition from her father of his whole means and estate, exclusive of her other two sisters by the former marriage, is liable *in solidum* for her father's debts *tantumquam successor titulo lucrativo, post contractum debitum*, without necessity of discussing the other sisters as heirs portioners of line. Durie, 15th February 1634, Orr *contra* Watson. --- But in this case, action of relief was reserved to her against her two sisters, who had got plentiful provisions from the father, equivalent, as was alledged, to the land-estate disposed to the defender. Durie, 21st March 1634, *inter eosdem*. --- The family-estate being disposed by the proprietor to the eldest son in liferent, and the eldest grandson in fee; this was found to make the son lucrative successor, tho' he pleaded, That the liferent settled upon him could not infer this passive title, seeing a liferent is not a right to which one can succeed; but this was not respected, seeing the liferent to himself, and the fee to his eldest son, was the same as making him fiar; besides, that, during his life at least, the grandson fiar could not be subjected to this passive title, not being *alioqui successurus* to the disponent. Durie, Spotiswood, (*Successor*) 23d March 1636, Forbes *contra* Fullerton of Kineber. --- In the like case, the grandson fiar, after the death of his father the liferenter, was found lucrative successor. Durie, 29th January 1639, Lady Smeiton *contra* Ld. Smeiton.

The disponent must be apparent heir in the subject

AN eldest son to whom the family-estate was dispon'd *post contractum debitum*, predeceasing the father disponent, a process was brought against

What if the disponent die before his father?

his sister after the father's death as representing her brother, and thereby liable *præceptione*, as the brother himself would have been had he survived the father; the Lords found it relevant to make the defender liable, that she was infeft, as served heir in special to her brother in the lands disposed to him by their father; but found her intromission with the rents of the said lands after her father's decease, if she was not infeft therein, only relevant to make her liable *in valorem* of her intromission, because she might be *in bona fide* to continue her brother's possession, without enquiring into his title, being willing to represent him; but found no other representation of her brother relevant to make her liable for any thing. Dalrymple, 24th January 1717, Henderfon *contra* Wilson.

Disposition
in trust for be-
hoof of the ap-
parent heir.

ONE having granted a disposition to a third party in trust, for behoof of his apparent heir, which was afterwards conveyed to the apparent heir, and he thereby in possession; this was not found to subject him to the passive title, but he was only made liable *in valorem* upon the act 1621. Stair, 14th January 1662, Harper *contra* Home.

What must
be the nature
of the subject
disposed, to
infer the pas-
sive title?

AN assignation of an heretable bond by the creditor in favours of his eldest son, found a *præceptio*, tho' the bond was for no greater sum than would be a sufficient provision to him, not considering him as heir; but if the son was *ab ante* creditor to the father, by a bond of provision or otherwise, an assignation to him of an heretable subject is not a *præceptio*, because it does not make him a lucrative successor. Stair, Newbyth, 2d December 1665, Edgar *contra* Colvils. — Accepting a disposition to moveables will not infer this passive title, because in these the apparent heir is not *alioqui successurus*. Stair, 7th February 1679, Hamilton *contra* Hay.

The dispo-
sition how far
must it be o-
nerous, to elide
the passive
title?

IT being covenanted in an eldest son's contract of marriage, That the tocher of 8000 merks should be applied for redeeming a wadset, and that the lands wadset should be disposed by the father to the eldest son and his heirs, a disposition by the father in implement of the contract, tho' in part lucrative, because the lands were worth more than the wadset sum, was found not to infer a *præceptio*, the son offering to restrict himself to the wadset, and that the lands should be redeemable from him accordingly. Durie, 14th January 1637, Courty *contra* Weemyfs. — An obligation in a contract of marriage, to provide the estate to the heir of the marriage, is not an onerous cause to protect the eldest son, to whom the estate is afterwards disposed, from being liable as lucrative successor; because the obligation imports no more than that the eldest son shall succeed, which of course makes him liable to all the debts; and therefore, as he has no claim to be infeft during his father's life, such infeftment is a plain *præceptio hæreditatis*. Stair, 29th November 1678, Higen *contra* Maxwell. — The like where the obligation in the contract is to provide the conquest to the heirs of the marriage. Forbes, 21st November 1705, Gillespie *contra* Gillespies. — To elide this passive title it was alledged, That the disposition was not merely gratuitous, but for onerous causes near equivalent to the worth of the lands disposed; the Lords, before answer, ordained the defender to produce his disposition and all instructions of the cause onerous, that they might consider if there was a considerable inequality

quality in the price. Stair, 22d November 1661, Boswal *contra* Boswal. Stair, 14th January 1662, Harper *contra* Home. --- A disposition of lands in an eldest son's contract of marriage was found not to make the son lucrative successor, seeing the father got the tocher of 10000 merks, and the son was burdened with 14000 merks of debt besides the father's liferent, tho' this onerous cause was within half the value of the land; but then the son was found personally liable for the value of the land so far as lucrative, with annualrent from the date of the contract, being the price of land. Stair, 17th, Gilmour, 21st June 1664, Lyon *contra* Ld. Ellick. --- In a disposition of lands by a woman to her eldest son, bearing to be *for sums of money*, the Lords found, That if the onerous cause were proved, tho' not equal to the worth of the land, the defender should not be liable in the passive title, but only *invalorem, in quantum lucratus erat*, without necessity of a reduction. Stair, 15th February 1676, Hadden *contra* Halyburton. --- Lands being disposed to an eldest son bearing onerous causes, the Lords admitted the onerous cause to probation, and thought, that if the cause onerous was short of the worth considerably, as within the half or the like, it would infer the passive title, but if near the worth, it would not, tho' there might be place for reduction upon the act 1621 to reach the excrescence. Stair, 29th November 1678, Haiggens *contra* Maxwell. --- A disposition to an eldest son, bearing for love and favour, and containing a personal faculty to the father to redeem upon payment of twenty shillings Scots, was found to be a *præceptio*, tho' the son offered to instruct that his father was debtor to him in more than the worth of the lands, by intromission with what was legated to him by an uncle. Gosford, 22d November 1671, Beattie *contra* Roxburgh.

IF the disposition be before the existence of the debt, tho' infestment be after, there is no room for the passive title. Durie, 23d February 1637, Lighton *contra* Ld. Kinaber. Stair, 23d July 1678, Fergusson *contra* Lindsay. --- A disposition of lands in favours of an eldest son, an infant, reserving the father's liferent, and containing a reserved faculty to redeem upon payment of a rose-noble, was found not to subject the heir to the payment of debts contracted after the date of the disposition, tho' in the plain sense of the matter, the alienation took place no sooner than the father's death. But as this is a rigorous passive title, there was no place for a favourable extension. Dirleton, 7th June 1674, *contra* Hepburn.

The debt must be anterior to the disposition.

A DECRET of violent profits against a father, being after the disposition by him in favours of his eldest son, was drawn back to a decret of removing, which was before the disposition, in order to be a foundation for the passive title, because the claim for violent profits did arise from the father's refusing to remove after warning, which the decret of violent profits did no more but liquidate. Spotiswood, (*Successors*) Auchinleck, (*Heir*) 14th January 1634, Ogilvie *contra* Ld. Menfir. --- A son, as lucrative successor *post contractum debitum*, was found obliged to enter heir to his father the wadsetter, in order to resign in favours of the reverser, because there was an obligation in the contract of wadset to resign upon payment, which was before the son's disposition, tho' the order of redemption and repayment of the wad-

What under stood to be anterior debt?

set sum to the father was after it. Dirleton, 14th, Stair, 15th January 1668, Earl Kinghorn *contra* Ld. Udney. — A party being holden as confes'd upon an accmpt referred to his oath, the Lords found his eldest son liable to pay the debt as lucrative successor, by a disposition posterior to the accmpt, tho' prior to the decret, holding him as confes'd. Forbes MS. 22d July 1714, Douglas *contra* Cochran.

What sort of creditors have the benefit of this passive title?

A PARTY who had only one son, and grandchildren by a deceased daughter, disposed his estate, first to the grandchildren, and thereafter to his son, who obtained himself first infeft. In a competition, the Lords found, That tho' the son had the first complete right, yet seeing he became thereby lucrative successor, he was bound to warrant his father's deed in favours of the grandchildren, and could not quarrel the same; upon which ground the grandchildren were preferred. Fountainhall, Forbes, 21st November 1705, Gillespie *contra* Carles.

Acceptance of the disposition sufficient.

IN a pursuit upon this passive title, the Lords found the defender liable upon his bare acceptance, tho' he had made no use of the disposition, and was satisfied to renounce the same; which, it was found, he could not do, after being delivered to him. Dirleton, 8th July 1676, Johnston *contra* Rome.

This passive title how purged?

IT was sustained as a defence in a pursuit upon the passive title, That the disposition in the defender's favours stood reduced, tho' the reduction was in absence. And the pursuer urging, That the defender ought at least to renounce his disposition, in order to give him, the pursuer, access to comprise the lands; 'this was not found necessary, because the pursuer might comprise; and if the defender should thereafter get the better of the reduction, and insist upon his disposition, then would there be place for the passive title. Durie, 15th January 1633, Kinnier *contra* Ld. East-Nisbet. — It was found relevant to purge this passive title, that the heir's right was reduced *in foro contentioso* by one of the father's creditors. And it being replied, That the heir got a sum of money for ratifying the decret of reduction; this was not respected, because it was taking a sum not to be successor. But the Lords found, That if the pursuer could qualify any prejudice by this ratification, it might be considered how far such prejudice would be sufficient to bind this passive title upon the heir. Durie, 27th January 1636, Straiton *contra* Chirnside.

Bond disposed to the heir presumed heretable, in order to infer the passive title.

A FATHER having assigned several bonds to his apparent heir, without specifying whether they were heretable or moveable; and the bonds being thereafter retired and cancelled, the Lords presumed the bonds to be heretable, in order to infer the passive title of lucrative successor. Stair, 7th February 1679, Hamilton *contra* Hay.

Accepting of a disposition with the burden of debts.

The dispo-
nee must de-
clare whether
he will accept
or repudiate.

ONE having disposed a tenement to a stranger, with this provision, "That the dispo-
nee, by accepting of the disposition, should be bound to pay a yearly annuity to the granter's heir;" in a process for payment of the the annuity, the defence was, That he had not as yet resolved,

solved, whether he would accept of the disposition, and there is no law obliging him to accept within a limited time. Answered, This is implied in the nature of the thing; it would be unreasonable to bring the pursuer under the necessity of entering heir, and subjecting himself to all the predecessor's debts, in the view of carrying a subject, which might be taken from him the next day by the disponent; and it would be as unreasonable for the disponent to stand silent, and neither touch the rents himself, nor allow them to be touched by the pursuer. The Lords found the defender must either accept or repudiate. 21st December 1737, *Montgomerie contra Montgomerie*.

IN a pursuit at the instance of creditors, upon this passive title, That the defender had accepted of a disposition from the defunct, with the burden of his debts, it appeared that the defender had borrowed up the disposition from the commissar-clerk, in whose hands it lay sequestered after the debtor's decease, and his acceptance being referred to oath, it was acknowledged, That, upon a transaction with the heir of line, he had renounced it in her favours, and got 2200 merks, but which, he added, was a gratuity for his services. The Lords found the acceptance sufficiently proved, the renunciation being *in favorem*, and *res ipsa loquebatur*, that the money was given for the renunciation. Here the heir was served *cum beneficio inventarii*. Fountainhall, 8th June 1699, *Creditors of Ord contra Lutefoot*.

ONE having made a tailzie of his estate to heirs-male, containing a clause, bearing, "L. 20000 to be paid to his only daughter out of the lands;" in a pursuit for payment, the heir pleaded, That he was not personally liable, and that the pursuer might insist against the estate upon her real burden. The Lords found the defender personally liable, in respect the clause bore the sum to be paid, which imports a personal obligation; but in regard the sum was appointed to be paid out of the lands, they found the defender liable only to sell the lands, and apply the price for the pursuer's payment, and therefore they decerned against him personally, superseding execution for a year, that, *medio tempore*, he might do diligence to sell and uplift. Stair, 2d December 1662, *Clark contra Clark of Pittencrief*. — Where a disponent is not taken bound personally to pay, but the subject only disposed *with the burden of debts*, he is not personally liable by acceptance, further than to the extent of his intromissions. Stair, 8th December 1675, *Thomson contra Creditors of Thin*. — Acceptance of a disposition, "burdening the receiver to pay the granter's debts," makes the receiver liable universally, without regard to the extent of the subject disposed. Fountainhall, 3d December 1678, *Ld. Wamphray contra Johnston*.

Apparent heir three years in possession.

AN apparent heir three years in possession of an infestment of annualrent, having uplifted the same, and granted discharge and assignation, it was found, That another apparent heir passing him by, and serving in the annualrent to a remoter predecessor, could not quarrel the said discharge and assignation. January 1729, *Competition betwixt Lord Halkerton and Drummond*. — The defunct's estate, wherein he died

infest, being a wadset, holding base of the reverser, wherein there was a back-tack, continuing the reverser in the possession, and obliging him to pay the neat annualrents of the wadset sum in name of tack-duty; and the apparent heir of the wadsetter uplifting these tack-duties for three years, this was found a possession in terms of the statute, so as to subject the next apparent heir, who pass'd him by, to his onerous debts and deeds. 19th December 1733, Johnston *contra* Steil of Bowrhouses.

What sort
of possession
infers the pas-
sive title?

THE possession of a relicf by a liferent right, granted by her husband the defunct proprietor, found not to be the apparent heir's possession, in the sense of the act 1695, so as to involve the heir passing him by in a passive title. 19th December 1733, Johnston *contra* Steil of Bowrhouses.

The heir
must be serv-
ed, bare pos-
session not suf-
ficient to make
him liable.

POSSESSION alone was found not sufficient to make the apparent heir liable, who had neither served heir to the last infest, nor succeeded to him by adjudication on his own bond. 12th February 1736, Lady Rattar *contra* apparent heir of Rattar.

Debts and
deeds how in-
terpreted?

ONE passing by an apparent heir, three years in possession, serving to a remoter predecessor, was found obliged to implement a destination of succession made by the apparent heir in his contract of marriage. Home, 17th January 1724, Muirhead *contra* Muirhead.—But is not bound to fulfil the gratuitous debts and deeds of the apparent heir. Home, 26th January 1726, Marquis of Clidisdale *contra* Earl Dundonald. February 1727, Mitchel *contra* Wilton.

Effect of the
passive title.

AN adjudication against an apparent heir for his own debt, who had been three years in possession without infestment, was found not a sufficient ground of preference in a competition for mails and duties, with a disposition from a person infest as heir to the remoter predecessor last infest, without prejudice to the adjudger to pursue the heir, passing by the immediate predecessor as liable *passive* for his debt. Forbes, 1st July 1707, Simpson *contra* Hamilton.

Relief a-
gainst the de-
funct apparent
heir's separate
estate.

ONE passing by an apparent heir three years in possession, and serving to a remoter predecessor, has relief of what debts he pays of the apparent heir's, against the apparent heir's representatives in any separate estate. Home, January 1727, Marquis of Clidisdale *contra* Earl Dundonald.

N.B. THE clause in act 24, parl. 1695, which founds this passive title, is in the following terms, "That if any man, since the first January 1661, have served, or shall hereafter serve himself heir, or by adjudication on his own bond hath, since the time foresaid, succeeded, or shall hereafter succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his goodfir, or the like, then, and in that case he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no further."

Vitious

Vitious Intromission.

A WIDOW's intromission with a small quantity of the defunct's goods, viz. felling of five bolls of corn, killing four or five sheep, and retaining thirty more yet extant, was found not sufficient to constitute her universal intrometter, so as to be liable for the whole debts, but only to make the particulars forthcoming. Durie, 5th December 1623, Scot *contra* Livingston. — A woman was found liable as intrometter with her deceased husband's goods, tho' all her intromission was only with wares in his shop, which were sold for the necessary aliment of herself and children, having no other means wherewith to entertain them. Durie, 20th March 1624, Cochran *contra* Sturgeon. — The defender having sold a little timber bed and a pint stoup belonging to her defunct sister, with whom she lived in the same house, this found to make her liable as vitious intrometter. Here the process was in absence. Durie, 5th February 1636, Mowat *contra* Pennie. — A party who intromitted with a horse belonging to the defunct, a hat, an iron saw, a chest and a brazen pistollet, found liable universally, having no title or pretence of a title. This also in absence of the defender. Durie, 12th January 1633, *contra* Bruce. — It was found a vitious intromission in a son, who was of the same employment with his defunct father, to make use of the defunct's tools and instruments. Gosford, 5th, Stair, 15th June 1675, Ld. Abercainy *contra* Nicol. — Transporting of a person's chests or trunks from the place where he died, to the defender's house, sustained to infer vitious intromission. Forbes, 29th June 1705, Archibald *contra* Lawson. — Mary Wallace being due the sum of 1000 merks by bond, a process for payment was brought after her decease against Elisabeth Wallace her sister and John and Mary Kings her children, concluding upon the passive title vitious intromission; the Lords found it only proved against Elisabeth Wallace, That she had some small moveables in her custody for the behoof of John and Mary Kings, which had been in the possession of Mary Wallace preceeding her decease, and that she delivered these moveables to John and Mary Kings upon their receipt, and found such custody and delivery not relevant to infer the passive title of vitious intromission against the said Elisabeth Wallace; and found it proved, That the defenders John and Mary Kings did receive from the said Elisabeth Wallace some of their mother's body cloths, a five guinea piece of gold, and four small pieces, in value twenty three shillings, and some household furniture that had been in the possession of their mother before her decease, for which they granted receipts in process to the said Elisabeth Wallace; but in respect of the small value of these particulars, and that special receipts were granted for them, and of the uncertainty whether the articles of household plenishing did truly belong to Mary Wallace the mother, or to Mr. John King her husband, and had only remained in her custody after the husband's death without title; and that by the proof it appeared, that the bulk of the effects of Mary Wallace had been roused by John Wallace her brother; found, That John and Mary Kings their intromission with the small particulars contained in the receipts, could not, in law, be construed an intromission *per universitatem*, and therefore not relevant to

the penal passive title of vitious intromission against them. 26th January 1739, Black *contra* Wallace and Kings.

ONE having uplifted L. 50 belonging to a defunct, and given his receipt for it, was found not liable as vitious intrometter, but only to accmpt for the sum. Stair, 26th February 1668, Reoch *contra* Cowan.

Where posses-
sion com-
menced law-
fully, the con-
tinuing in
possession will
not be vitious
intromission.

A HUSBAND, after his wife's decease, cannot be conveyed as vitious intrometter with her goods, to pay her debt, he being *dominus omnium ejus bonorum*, and continuing only in that possession after her decease, which he once as husband had lawfully acquired. Durie, Spotiswood, (*Husband*) 16th January 1628, Allan's executors *contra* Lauderdale. Durie, Spotiswood, (*Husband*) 7th February 1629, Brown *contra* Dalmahoy. --- It being pleaded, That the fiar of a coalwork, did, after the liferenter's death, continue to work by his servants with the instruments of the coalwork which belonged to the liferenter; this was repelled, it not being properly an intromission, but only a continuation of possession. Stair, 9th June 1680, Brown *contra* Earl Lothian. --- When a person enters to the possession of the defunct's house by warrant of the Lords, his possession of the goods in the house doth not infer vitious intromission; unless he make use of goods, which *usu consumuntur*, or dispose of goods that are not of that nature, such as beds, tables, &c. Dirleton, 10th June 1674, Lady Spencerfield *contra* Hamilton.

What if the
party died at
the horn?

IT is no defence against vitious intromission, that the party whose goods are intromitted with died at the horn, because his moveables ly still open to the diligence of creditors, unless there were a general declarator upon the gift. Stair, 7th February 1662, Gray *contra* Dalgarno. Stair, 27th February 1662, Chalmers *contra* Dalgarno.

If there's an
executor con-
firmed?

WHERE there is an executor confirmed, tho' the goods intromitted with have been omitted out of the inventory, yet, as this cannot be other than an intromission with such and such particulars, and cannot admit of the construction, that the party meant to intromet with the defunct's goods *per universitatem*, it will not subject him to the universal passive title; besides, that in strict law the executor is the only one who is intitled to gather in the defunct's moveables, and call intrometters to accmpt, and the creditors have no action save against the executor. The case is the same, tho' it be an executor creditor who is confirmed; because the *universitas mobilium* may be comprehended under such a confirmation, and brought into the inventory. And it cannot make a difference in the case, that more or less is confirmed; but there the creditors have their choice to confirm the subject intromitted with, or to insist directly against the intrometter to accmpt for his intromission. Durie, Spotiswood, (*Universal Intrometter*) 20th June 1629, Douglas *contra* Tours. See act 20, parl. 1696.

THE Lords found, That super-intromission, subsequent to a confirmation, does only infer restitution of the value; but if it was prior, that the fraudulent concealment makes the executor liable universally. Hope, (*Universal Intrometters*) 1st February 1616, Johnston *contra* Ker. Durie, Spotiswood, (*Executors*) 13th February 1627, Kneeland *contra* Baillie's relict. Fountainhall, 2d February 1697, Ramsay *contra* Carnegie of Phinhaven. Fountainhall, 17th February 1697, Mar-

Marquis of Tweddale *contra* Relict and children of Dempster.--- An executor having omitted to confirm some moveable sums due by people in Holland, which he behoved to know of by the debtor's compt-books, and having intrometted with the same, the Lords found these sums *doloſe* omitted, and the intromiſſion to be vitious. Fountainhall, 28th January 1678, Anderson *contra* Anderson.

A GENERAL diſpoſition of moveables, tho' an incomplete right without confirmation, was ſuſtained to defend the diſponee from being liable as vitious intrometter. Stair, 27th February 1662, Chalmers *contra* Dalgardno. Stair, 6th July 1664, Brown *contra* Lawſon. Stair, Gosford, 16th June 1671, Bowers *contra* Lady Coupar. Stair, 15th June 1681, Baird *contra* Robertſon. --- A general diſpoſition by the deſunct, with an instrument of poſſeſſion, found to excuſe the diſponee from vitious intromiſſion; tho' it was dubious whether the particulars he intrometted with were comprehended under the general words of the deed. Stair, 12th July 1666, Scot *contra* Montgomery. --- A relict's intromiſſion in virtue of a claufe in her contract of marriage, providing her to goods and gear acquired during the marriage, found not to be vitious, tho' it neither could be a title for a *brevi manu* intromiſſion, nor could there be any claim upon it till the debts were firſt ſatiſfied. Stair, 23d December 1668, Smith *contra* Mure.

Any colour-
able title of in-
tromiſſion re-
levant to elide
the paſſive
title.

LETTERS of adminiſtration in England, tho' no title for intromiſſion *extra territorium*, yet ſuſtained as a colourable title to defend the intrometter in Scotland from being univerſally liable to the creditors. Marcus, (*Airs*) March 1686, Bell *contra* Elliot of Dunlabyre.

FOUND ſufficient to elide the paſſive title, That the defender did intromet either by virtue of a gift to himſelf, or by warrant from the donatar, tho' the gift was not declared: For his poſſeſſion *ab initio* being in virtue of a title, tho' not perfected, could not be ſaid to be vitious, and *quivis titulus etiam coloratus* purges the vitiousneſs of the intromiſſion. Stair, Dirleton, 10th June 1674, Lady Spencerfield *contra* Hamilton. Dirleton, 16th December 1674, Drummond *contra* Menzies. --- Vitious intromiſſion ſuſtained, notwithstanding the defender alledged he intrometted in virtue of a gift of eſcheat, upon which declarator had followed; in reſpect it was answered, That the gift was ſimulate, the rebel having been allowed to continue in poſſeſſion until his death, no leſs than thirteen years after the declarator; and therefore the gift of eſcheat was found to be not ſo much as a colourable title to elide the paſſive title. Durie, Spotiſwood, (*Universal Intrometter*) 12th July 1628, Ld. Morifton *contra* Ld. Frendraught. --- The like. Durie, 28th June 1632, Dalrymple of Waterhead *contra* Ld. Cloſeburn. Durie, 15th December 1638 Ogilvie *contra* .

VITIOUS intromiſſion is a paſſive title beneficial to perſonal creditors only, not to creditors whoſe debts are heretable, where the heir is ultimately liable. Hope, (*Intromiſſion*) 18th December 1617, Lord Garlies *contra* Kilpatrick. Dalrymple, 28th January 1715, Houſton of Calderhall *contra* Sir Alexander Maxwell of Monrieth. --- Sir William Menzies granted a bond of aliment to his daughter on deathbed, for payment of which, proceſs was intended againſt Sir William's repreſentative, upon the paſſive title of vitious intromiſſion. The de-

How and to
whom compe-
tent to inſiſt
upon this paſ-
ſive title?

fence was, That tho' this obligation was conceived *per modum actus inter vivos*, yet being granted upon deathbed, and not delivered till after death, it was a *donatio mortis causa*, which the granter did not design to be binding upon him if he reconvalesced; and therefore, she had not the benefit of the passive title vitious intromission, which was introduced in favours only of proper creditors of the defunct, such who could have compelled him by way of process to implement. And it was added, That a *donatio mortis causa*, in whatever terms conceived, is more properly a *legacy* than an *obligation*. The Lords found this bond to be a debt relevant to subject the defender as vitious intrometter. 5th December 1729, Loch *contra* Menzies.

In a process for payment of a bond due by the defunct, at the instance of the heir of line, who had no benefit by the succession against the heir of provision, the defence was, That the pursuer was vitious intrometter with the defunct's goods, and so the debt was extinguished *confusione*; the Lords refused to sustain vitious intromission by way of defence, but sustained compensation to the extent of the pursuer's intromission. Durie, 20th November 1630, Pride *contra* Thomson. ---- In a pursuit upon the passive titles against an heir, for payment of the defunct's bond, the defence was, That the pursuer's cedent was vitious intrometter with the defunct's effects, when the debt was in her person, & *confusione tollebatur obligatio*, which must be good against the assigney. Answered, Vitious intromission is not competent by way of defence. The Lords found, That whatever might be said to sustain vitious intromission by way of defence, had the intrometter herself been insisting, it was not competent against the assigney. Stair, 20th January 1671, Ramsay *contra* Henderson. ---- In a pursuit against the heir for payment of moveable debts due by the defunct, this objection was sustained tho' pleaded for the heir, not for creditors, that the pursuer had vitiously intromitted with the defunct's moveables, and that he could not pursue for payment of debts, which he himself was bound to pay without relief from the heir. Dalrymple, 28th January 1715, Houston of Calderhall *contra* Sir Alexander Maxwell of Monrieth.

This passive title how purged? Imo, Where an executor is confirmed *ante litem motam*.

CONFIRMATION of the defunct's moveables, before process is commenced at the creditor's instance for vitious intromission, purges the vitiosity whoever be the executor. The administration of moveables after the death of the proprietor, belongs to the church; and when one is decerned executor by the commissar, it is the same as naming him trustee for ingathering the defunct's moveables, which of consequence he has right to claim from every person upon using the form of a confirmation; the vitious intrometter then becomes accomptable to him, and regularly to him only, which of course must purge the vitious intromission, because, from the nature of his office, he can insist no further than for compt and reckoning: And tho', even after confirmation, action is sometimes sustained to creditors against those who intromet with subjects left out of the inventory of the confirmed testament, which in strict law is competent to the executor only; yet that is no more but a favourable extension for the ease of creditors who have once commenced a process upon vitious intromission, not knowing that there has been an executor appointed, to save the circuit of a new process against the executor, or a confirmation *ad omiffa*; and by the common rules of law an extraordinary remedy can go no further than the ordinary

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nary remedy, in place of which it is substituted. Thus in a pursuit upon the passive title vicious intromission, it was sustained as a defence, That decret was already recovered by the executor against the defender for her intromissions. Hope, (*Intromission*) Thomson *contra* Executors of Thomson.---- Nay, the defence was sustained, where a party, after intrometting with the whole goods, obtained a beggar to be confirmed executor, and another beggar to be cautioner, himself being at the expence of the confirmation, and obliging himself to warrant the executor. Durie, 28th July 1626, Tennant *contra* Tennant. — In a pursuit against the relict for vicious intromission, the defence was sustained, That there was an executor confirmed, tho' some of the particulars she had intrometted with were omitted in the inventory : But, in the same process, she was found liable to accompt to the creditor for her intromissions, so far as not contained in the confirmed testament, without necessity upon the creditor to take a dative *ad omiffa*. Durie, Spotiswood, (*Executor*) 28th March 1632, Maxwell *contra* Lady Stanlie.

CONFIRMATION expedie before process is moved against the vicious intrometter, purges the vitiosity, at whatever time the confirmation be taken out ; but if the confirmation be within year and day of the proprietor's death, it purges the vitiosity, whatever processes may have been raised at the instance of the creditors against the vicious intrometter ; for such time it would seem is indulged for discovering the defunct's effects for making inventar, and for expeding the confirmation. Hope, (*Executor*) 12th January 1622, Badd *contra* Hamilton. Durie, 14th July 1626, Smith *contra* Gray. Durie, Spotiswood, (*Executor*) 24th January 1628, Adie *contra* Gray. Spotiswood, (*Executor*) 5th March 1629, Thomson *contra* Ld. Renton. H Marcus, (*Executry*) January 1685, Sir Patrick Home *contra* Fountainhall, 3d July 1701, Alexander *contra* Liston.— And where one intrometted who was named executor by the defunct, the vitiosity was found purged by a confirmation *post litem motam*, tho' it was more than year and day after the testator's decease, more indulgence being given to executors named by the defunct than to others. Durie, 21st March 1628, Relict of Lindsay *contra* Ellies. Durie, 25th November 1630, Miniman *contra* Ramsay. — And in this last case a conjunct intrometter, called in the process, was also assoilzied from vicious intromission, and found only accomptable to the executor testamentar : But in other cases, where such indulgence is not given, a confirmation after year and day will be no defence against a process already commenced ; and this was so strictly taken, that a confirmation after year and day, was not sustained, being posterior to the execution of the summons, tho' before the day of compearance. Durie, 20th March 1624, Cochran *contra* Sturgeon.

'Tis probable the confirmation of an executor-creditor would be found equiparat to the confirmation of an ordinary executor, with regard to the purging of vicious intromission, the trusteeship is the same, and the title of intromission the same, there being nothing to bar the executor-creditor from uplifting the defunct's whole effects. Thus far the Lords have gone to sustain confirmation by a creditor within the year and day, to purge the vitiosity of his own intromission, tho' process was commenced against him before the confirmation. Stair, 28th January 1663, Stevenson *contra* Ker.

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BUT

2d, If an executor be confirmed within year and day, tho' *post litem motam* ?

3d, Confirmation of an executor-creditor,

4to, Roup-
ing by autho-
rity of a ma-
gistrate, not
sufficient to
purge.

5to, Declara-
tor of escheat
obtained *ante*
litem motam.

BUT the inventorying and rousing of goods vitiously intromitted with, tho' done by authority of a magistrate, & *ante litem motam*, was found not to purge the antecedent vitiosity. Forbes, 29th June 1705, Archibald *contra* Lawfon.

DECLARATOR upon a defunct's escheat is sufficient to purge a vitious intromission with the defunct's moveables, being obtained before any suit at the instance of the creditors against the vitious intrometter, because the defunct's whole moveables become the donatar's property upon the declarator, and the vitious intrometter comes to be accomptable to him only, exclusive of the creditors; neither have they any interest to challenge an intromission as vitious, by which they are not prejudged. Durie, Spotiswood, (*Escheat*) 26th November 1630, Fullerton *contra* Kennedy. Spotiswood, (*Escheat*) 29th November 1633, Mudie *contra* Hay. Durie, 27th January 1636, Straiton *contra* Chirnside. Stair, Dirleton, 10th June 1674, Lady Spencerfield *contra* Hamilton. Dirleton, 16th December 1674, Drummond *contra* Menzies. — A natural son, after intrometting with the defunct's moveables, having obtained a gift of his escheat, and commenced declarator, upon which there was litiscontestation, this was found relevant to purge his vitious intromission, in a process at the instance of the creditors against him, he being *in cursu diligentiae*. Durie, 17th July 1635, Lord Johnston *contra* Johnston. — Nay a gift of escheat to the intrometter himself, *ante litem motam*, is sustained to purge vitiosity, tho' there be no sort of diligence upon it. The reason given is, That the gift to the intrometter himself is effectual without declarator; but of this there is some doubt: A special declarator indeed is not necessary, but a general declarator, which is not a process for payment, but a step of diligence, in order to complete the conveyance, like the intimation of an assignation, ought to be requisite in all cases. Stair, 7th February 1662, Gray *contra* Dalgarno. Stair, 27th February 1662, Chalmers *contra* Dalgarno. Stair, 22d January 1675 Chalmers *contra* Gordon. — And a warrant from a donatar of escheat to intromet, being *ante litem motam*, found sufficient to purge a prior vitious intromission, tho' there was no declarator; for this was the same, as if the donatar himself had intromitted. Stair, 4th July 1665, Innes *contra* Wilson. — And where the gift of escheat was taken out without delay after the rebel's death, it was sustained to purge the vitious intromission, tho' the gift was *post litem motam*. Stair, 1st January 1680, Urquhart *contra* Dalgarno.

In libelling
vitious intro-
mission, the
pursuer need
not condescend
upon particu-
lars.

THE pursuer in libelling upon vitious intromission, is not bound to condescend upon particulars; but, in the course of the process, if the defender acknowledge his intromission with such and such particulars, and assign a reason for his intromission relevant to elide the passive title, the pursuer in that case must condescend upon further particulars: But then it will be sufficient that he be particular in the kinds, tho' not in the individuals. Spotiswood, (*Universal Intrometter*) 12th and 14th January 1630, Adamson *contra* Ld. Freeland.

WHO entitled to have heirship moveables, so as to infer behaviour against his heir by intromission therewith? See Heirship Moveables.

PENAL

PENAL passive titles an transeunt in hæredes? See *Personal and Transmissible*.

DISPOSITION to the heir post contractum debitum, if probative of its onerous cause? See *Proof*.

TUTORS intromission, if it make a passive title against the pupil? See *Tutor and Pupil*.

DISPOSITION to the apparent heir, reserving the granter's liferent and a power to alter, if it will infer a passive title against the disponee? See *Faculty*.

PATRONAGE.

A PATRON of a prebendary having granted a presentation to a man, and, after his decease, to his son, the presentation was found ineffectual *quoad* the son's right, after the patron's decease, and that it could not prejudice the succeeding patron. Gosford, 24th January 1677, Ld. Innernytie *contra* Nairne. Power of presentation.

A PRESBYTERY refusing a presentation duly tendered to them in favours of a qualified minister, against which presentation or presentee there lies no legal objection, and admitting another person to be minister, the patron has right to retain the stipend, as in the case of a vacancy. 15th February 1735, Moncrief of Redie *contra* Mr. Patrick Maxton. If the presentation be refused?

THE Lords sustained a presentation granted by a bishop, as having right to present *jure devoluto*, in respect the patron did not present a qualified person within the six months, the time allowed by the act of parliament, in which the patron is to perfect all his presentations. Home, November 1682, Jarden *contra* Thomson. --- The Certification of the act 18, parl. 1685, *sciz.* That the patron shall lose his right of presentation for the next vice, if he fail to apply the vacant stipends to pious uses within the parish, was found to militate against the heir of the patron, tho' it was *delictum defuncti*, and the heir a minor: Since the Lords considered it rather as a *jus accrescendi* to the moderator and presbytery, and the tinsel was declared against the defunct in his own lifetime. Fountainhall, 8th December 1696, Presbytery of Falkirk *contra* Earl Callender. *jus devolutum.*

THE town of Haddington having established a second minister, and provided him in a stipend by a voluntary contribution, the patron was found to have right to present both ministers. Stair, 18th November 1680, Town of Haddington *contra* Earl Haddington. --- A town having doted a stipend to a second minister, and having been in constant use of calling and presenting him, without question from the patron of the church; the Lords found, That the town had right to the patronage of that second minister, which they would not have had, if To whom belongs the patronage of a new creation?

the possession of presenting had been dubious. Falconer, Home, 10th January 1683, Town of Dundee *contra* Earl Lauderdale.

To whom,
of a disjoin'd
church?

A CHURCH being only a pendicle of another church, from which, for conveniency, it had been dismembred; and the question being, whether the patron of the mother church was thereby also patron of the pendicle, or if the parson of the mother church was patron, from whom several presentations were produced, so that since the abolition of Episcopacy, the patronage must devolve upon the crown; the Lords found the patron of the mother church not patron of the other. Fountainhall, 8th February 1709, Town of Lanerk *contra* Innes and others.

Patronage
transmissible
without infeft-
ment.

PATRONAGE being *jus incorporale*, is transmitted by disposition without infeftment. Stair, 6th July 1666, Parson of Morum *contra* Ld. of Bierford. Durie, 5th July 1632, Sheriff of Forrest *contra* Town of Selkirk.

Who has
the admini-
stration of the
vacant stipend?

THE patron's gift of the vacant stipend to the last minister's widow and children, found a pious use, in terms of the act of parliament, provided they dwelt within the parish at the time. Fountainhall, 20th February 1694, Donaldson *contra* Brown. — In a double pointing about a vacant stipend, where the patron had destinated the same for building a bridge in the parish; and on the other hand the heretors and presbytery had allocated the same for repairing the church and manse: It was found, That since the patron was never interpellated by the heretors and presbytery to apply, but that he had made the first application himself, and that to an uncontroverted pious use within the parish, therefore his destination must be preferred. Fountainhall, 6th December 1695, Lord William Douglas *contra* Heretors of the church of Mannour. — A patron who had assigned the vacant stipend, but alledging that the assignation was in trust to the patron's own behoof, that he might apply it to pious uses; the Lords found, That the assigning it was a misapplication, by which the patron forfeited the management and administration of it for this vacancy, and therefore preferred another, who was donatary by the privy council; and found, That the declaring now, *ex post facto*, that it was only in trust, was not sufficient to redintegrate and validate the same. Fountainhall, 17th January 1699, Maxwell *contra* Heretors of Kirkbane. — A patron having obtained an act of privy council, for applying part of the vacant stipend of the parish towards repairing a neighbouring harbour, which was not within that parish; and one of the heretors taking a discharge of his proportion of the stipend, and granting bond for the sum to the shore-master; that same heretor being charged on the bond, and at the same time distressed by the presbytery, who were to apply the vacant stipend to pious uses within the parish, which they alledged the privy council could not invert by their act, it being so ordered by the act of parliament; the Lords, in this competition preferred the presbytery and parish before the harbour, and found, That the stipend must be applied to pious uses within the parish in the first place. Fountainhall, 20th June 1700, Lady Pitligo *contra* Cheyne.

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THE exception in the act of parliament 1606, restoring bishops, was found to be understood of patronages, as well of menſal kirks, as of thoſe whereof the preſentation belonged to the biſhop. Auchinleck, (Kirk) March 1630, Biſhop of Dunkeld *contra* Lord Balmerino. Act 1606.

P A Y M E N T.

A BLANK bond being loſt, and the debtor at the bar offering to pay, upon his being ſecured againſt any perſon that ſhould find it; the Lords reſolved to take all poſſible trial, by the debtor's oath and otherwiſe, of the date, and writer's name and witneſſes, &c. and thereafter to ordain the debtor to pay upon ſurety, that the purſuer ſhould relieve him of any bond that ſhould be found of that date and ſum, and written and ſubſcribed by the writer and witneſſes that ſhould be found to have been in the ſaid bond. Dirleton, 12th February, Stair, 27th June 1676, Gibſon *contra* Fife. — A party having aſſigned an heretable bond, which thereafter was adjudged from the aſſigney; and in a proceſs for payment at the adjudger's inſtance, the debtor contending, that he was not bound to pay unleſs the principal bond and aſſignation (which, for ought he knew, might be defective and null) were produced; the Lords judging it hard to burden an adjudger with ſuch a production, repelled the defence, and found, That their decreet would be a ſufficient warrant for the debtor to pay, eſpecially that here there was no other creditor competing with the adjudger for the ſum. Fountainhall, 27th February 1707, Campbell *contra* M'Aulay.

Where the ſecurity cannot be produced?

AN adjudication being led *contra hereditatem jacentem* upon the apparent heir's renunciation, and the apparent heir's factor having paid the debt in the adjudication, by his conſtituent's orders, out of the rents of the eſtate intromitted with by him, taking a conveyance of the ſame blank in the aſſigney's name: The adjudication in the perſon of one deriving right from the apparent heir, was found ſopite and extinguished, as paid out of the rents, which were the proper ſubject of payment, ſo as not to affect the eſtate, now in the perſon of another heir, who had paſt by the apparent heir, and ſerved to the laſt deſunct. Forbes, 13th February 1713, Earl Dalhousie *contra* Lord and Lady Hawlay.

Rents applied by the apparent heir for purchaſing an adjudication, makes payment and extinction.

THO' intromiſſion by an appriſer operates extinction, yet an appriſer having compted with and paid back to the debtor the ſuperplus of his intromiſſions over and above his annualrents, this was found relevant againſt another appriſer purſuing a proceſs of extinction, whoſe denunciation was after the repayment. Stair, 21ſt December 1675, Clark *contra* Robertson.

Appriſer compting for his ſuper-intromiſſions with the debtor.

AN executor is impowered *virtute officii*, to apply his intromiſſions for payment of the deſunct's debts; and as he may pay *primo venienti*, ſo, if he himſelf be a creditor, he may of courſe retain for his own payment. Executor retaining for payment of debt due to himſelf.

payment. It is true, an executor cannot safely pay without decree; but, as he cannot take a decree against himself, he must either be allowed to pay himself without decree, or not at all. And this was found in a case, where an executor, *qua* nearest of kin, had intermeddled before confirmation, and was pursued as vitious intrometter; but having thereafter confirmed within the year, which purged the vitiosity, the confirmation was drawn back, and sustained to found the executor in his right of retention, equally, as if he had been confirmed before intromission. Durie, 26th January 1628, Adie *contra* Gray. — In the same cause the executor was allowed retention of a debt he had paid as cautioner for the defunct, before intending of the above process against him. Durie, *ibid.* — But an executor was not allowed to exhaust the testament by debts, wherein he was cautioner for the defunct, unless he had made actual payment before, being interpellated by other creditors; yet he was allowed to plead his claim of relief thus far, to come in *pari passu* with the creditors doing diligence against him. Durie, *ibid.* — Tho' an executor may exhaust the testament by debts due to himself, without necessity of doing diligence, a legacy left to him is upon a different footing, which he is not allowed to take credit for, in exclusion of the other legatarys; for seeing the legacies are all expressed in the testament, they must come in *pari passu*, and he is not allowed to pay *primo venienti*, as in the case of debts; yet where a legacy of L. 20 was left to an executor to buy a suit of mournings, he was allowed to take credit for what part of the sum he had *de facto* employed that way, as being a sum to be laid out *ante omnia* by the express orders of the defunct. 31st January 1736, Legatarys of John Caldwell *contra* Thomas Caldwell.

Intromission
by tutors, fa-
ctors, &c. if
equivalent to
payment and
extinction of
the debts due
to them, so as
to bar them,
or their affig-
nies, from
pursuing *ante
redditas ratio-
nes*?

TUTORS and curators are impowered *virtute officii*, to apply their intromissions for payment of the minor's debts. Any debt therefore due by a minor to his tutor or curator must be understood extinguished by intromission, unless the tutor or curator, upon a compt and reckoning, make out that his intromissions were totally applied another way. Upon this footing it was found, That a curator must account for his intromissions, before he can claim payment of a debt that was due to him by the minor's predecessor. Gosford, 26th July 1677, Ld. Raploch *contra* Ld. Lamington. — The like, where the pupil's debt was purchased in by the tutor, whether during the tutory. Gosford, 13th December 1676, Lord Melvil *contra* Montgomery. Home, November 1685, Nisbet *contra* Smiths. — Or before it commenced. Marcus, (Tutors) 5th February 1687, Lady Ninewells *contra* Smiths.

UPON the same footing it was found, That the tutor's assigney could not force payment from the *quondam* pupil, until the tutor should clear accompts. Dirleton, 7th July 1676, Spence *contra* Scot. — The same obtains in the case of an assigney made by a curator. Stair, 2d December 1679, Cleland *contra* Baillie of Lamington. See Stair, 24th January 1662, Ramsay *contra* Earl Winton. — Upon the same principle, after the decennial prescription of tutory and curatory accompts; the curator's heir insisting against the *quondam* minor for payment of a debt that fell not under the curator accompts; the Lords sustained the defence, That the curator *intus habuit*. Dalrymple, Bruce, 9th December 1714, Baillie *contra* Baillie of Lamington. — The like.

17th June 1737, Sir John Scot of Ancrum *contra* Sir Robert Douglas of Glenbervie. In which case it was yielded, That the defence could not stand upon the footing of compensation, because the defender's claim upon his curator's intromission was sopped by the decennial prescription. — As also the Lords refused to allow a minor's estate to be adjudged upon a debt purchased in by the curator, and taken in an assigney's name, *ante redditas rationes*, altho' the assigney had, for the said assignation, discharged an equivalent debt owing to him by the curator. Forbes's MS. 20th July 1714, Brabner *contra* Cook.

BUT as a factor is understood to be no more but a hand for holding his constituent's money, and has no power to apply his intromissions for payment of debt; his assigney, in a liquid debt due by the constituent, will have good action, without being bound to compt and reckon for his cedent, unless the factor's intromissions are liquidated, so as to meet the assigney by way of compensation. Stair, 7th January 1680, M'Bride *contra* Lord Melvil. 17th January 1717, Menzies *contra* Littlejohn.

A REAL creditor upon a bankrupt estate, who was also cautioner for the factor, having conveyed his debt to a creditor of his own for his security and payment; the question arose, If the assigney could draw this debt out of the bankrupt estate or price thereof, without being chargeable for the balance due by the factor, who was now become bankrupt, as well as his cautioner the cedent. In this case there could be no place for compensation; for, *esto* the balance due by the factor had been liquid, the cautioner was creditor upon the estate, but had no claim against the co-creditors, neither was he debtor to them for the factor's intromissions, but to the court of session; neither could payment or extinction be pleaded, because a factor has no power to apply his intromissions towards payment of his own debt, and far less has his cautioner power to apply the factor's intromissions; the Lords therefore found, That the onerous assigney was not liable to accompt for the factor's intromissions, and repelled the objection pleaded against him upon that head. 5th December 1734, Brymer *contra* Graham. — In a former case, the Lords sustained the objection against the onerous assigney. 3d January 1730, Oliphant *contra* Morisons.

A CREDITOR in an infestment of annualrent, intrometting with more than his annualrents, his superintromissions will be imputed in extinction of his principal sum; for tho' his intromission was *sine titulo*, seeing the infestment was in security and payment of the annualrents only, yet he is not allowed to object the want of a title. Stair, 4th February 1671, Wisheart *contra* Arthur. — The contrary found where the question was with a singular successor, who had acquired the infestment of annualrent for an onerous cause; for intromission *sine titulo* is not legal payment to operate a real extinction; the debtor has his option to demand payment of the rents from his creditor, as intrometted with *sine titulo*; and if a personal objection ly against the creditor, making the intromission equivalent to payment *quoad* him, but not *quoad* the debtor, this cannot militate against a singular successor. Fountainhall, 2d January 1705, the Heirs of Learmont *contra* Gordon. — But afterwards, in a like case, the superintromission was found to militate against the singular successor. Forbes, 25th January 1711, Baillie *contra* Menzies. — An improper wadsetter having given the reverfer a back-tack, for payment of a tack-duty equivalent to the annualrent,

Intromission
by a creditor,
without a suf-
ficient title
may be plead-
ed as payment
against him,
tho' not for
him.

and upon failure of payment, having apprised the lands for the tack-du-
ties resting owing; and upon that title having uplifted sufficient to ex-
tinguish, not only the apprising, but also the wadset sum; this irregu-
lar intromission was found not equivalent to real payment, so as to ex-
tinguish the wadset, and consequently to hinder the ward to fall by the
wadsetter's death. Marcus, (*Ward*) 15th February 1688, Lord
Chancellor *contra* Brown.

Payment before Hand.

IN a pursuit at the instance of a donatar of escheat against the rebel's
tenants, the Lords refused to sustain their exception of payment
made to the rebel himself, because it was done before the term. Au-
chinleck (*Escheat*) Durie, 29th February 1628, Ld. Lauchop *contra*
Tenants. Haddington, 14th January 1602, Home *contra* Cairncrofs.
— Found, That mails advanced by the tenant to the heretor before
the term of payment does not liberate the payer if the receiver be de-
nuded of his right in favours of another, before expiring of the said
term, but prejudice of the tenant's relief against the heretor. Du-
rie, 12th June 1629, Gray *contra* Campbell. — A tackfman can-
not warrantably pay his rent before the term, but is liable to creditors
notwithstanding. The same holds in sub-tenants. Stair, 5th Febru-
ary 1667, Lady Traquair *contra* Howatson.

It being the custom of a certain barony, that the tenants at their en-
try pay half a year's rent, and so all along half a year before the hand;
this was sustained to a tenant against a singular successor, tho' it was
argued, that no payment before the hand can liberate from a singular suc-
cessor, because who hath right to the land hath right to the fruits ex-
tant upon the land, or growing after the commencement of his right, and
consequently to the rent payable therefore; in respect it was answered,
That here every year is paid within itself, and so the first year the half at the
beginning thereof, and the half at the middle, and subsequent years con-
form, which must be sufficient to the tenant; otherwise tenants paying
at Whitsunday and Martinmas should not be liberated, because the
whole year is not run out; or paying their farms at Candlemas, should
not be secure for the profit of grass thereafter till Whitsunday. Stair,
7th January 1662, Earl of Lauderdale *contra* Tenants of Swinton.

PAYMENT before the term, by a tenant to an assignee by his
master, found not relevant against an arrester. Haddington, ult. Ja-
nuary 1611, Wilson *contra* Warrock.

P E E R.

In what ca-
ses obliged to
depone?

A PEER, who was pursued for a merchant accompt, alledging,
That he was only obliged to declare upon honour; the Lords,
after the Lord chancellor and judges of England had declined to give
their

their opinion in this nice point, found, That Peers were bound to depone where the oath was final and decisive of the cause, whatever they might plead in oaths of calumny or credulity, or oaths *in litem*, or on the verity of their debts, or the like. Fountainhall, Forbes, 7th February 1710, Bryson, &c. *contra* Duke of Athole. — The like. Forbes, 9th February 1711, Earl Winton's case. — In a reduction of a right, the defender alledging, That the writs called for were in the pursuer's own hand, and referring the having of them to his oath, the pursuer, being a Peer, offered his word of honour, which he alledged was the privilege of the English Peers; the Lords found, That in this case a Peer must give his oath, it being upon the matter an exhibition. Fountainhall, Forbes, 19th December 1711, Duke of Montrose *contra* M'Aulay.

FOUND, That a Peerage, which needs no investment, being resigned in the crown's hands, not *ad remanentiam* but, *in favorem* of a third party, the resigner was actually denuded thereby; tho' it was pleaded, that a Peerage is not alienable; it being answered, That it is alienable with the sovereign's consent, which he had virtually given by accepting the resignation *in favorem*; and this was found, tho' the King had done no deed in favours of the third party. Durie, 11th July 1633, Oliphant *contra* Oliphant. Peerage if alienable?

P E N A L T Y.

CONVENTIONAL penalties, by the practice of Scotland, cannot be further exacted than so far as the real damage and interest of the pursuer extends to; because they approach too near to usury, and would elude the law. Sinclair, 22d March 1550, Home *contra* Hepburn. — Margaret Craig having obtained decret against Oliver Sinclair, decerning him to complete the bond of marriage with her; he gave bond to her to solemnize the marriage at a day certain, under the failzie of 500 merks. Failzie being incurred, the whole penalty was found due. Spotiswood, (*Marriage*) Durie, 16th December 1628, Craig *contra* Sinclair. — Penalty modified against a cautioner in a bond to the ordinary annualrent of the sum, the bond bearing no annualrent. Haddington, *penult.* November 1622, Semple *contra* Semple. — A penalty being adjected to a tack of five years; in case the tenant failed to manure the ground; and he having failed the last of the years only, the Lords found, That he could not be decerned in the whole penalty, altho' the clause bore to pay the same in case of failzie indefinitely, and did not restrict the payment of the whole to the failzie of all the years, and found, That no more could be decerned for the failzie of one year, but the fifth part of the penalty. Durie, 22d February 1639, Johnston *contra* Forbes. — Land being verbally set to a tenant under a penalty, that if he entered not, he should pay a year's rent; the whole penalty was found due, tho' the tenant refiled *rebus integris*. Durie, 15th July 1637, Skeen *contra* Penalty how far extensible?

Payment of
the penalty, if
it liberates
from the prin-
cipal obligati-
on?

ONE being obliged to deliver certain quantities of straw, and to pay a liquid sum in case of failzie; found, That the subjoining the penalty does not liberate from fulfilling that which is principally covenanted. Durie, 19th March 1630, Chrichton *contra* Pirie.—A man obliging himself to cause another subscribe cautioner in a bond against such a day, under a penalty, and being charged upon this obligation, the Lords, notwithstanding his offer to pay the penalty, found the letters orderly proceeded for fulfilling the whole obligation, and refused to free him upon payment of the penalty. Spotiswood, (*Contracts*) Auchinleck, (*Penalty*) 14th June 1632, Clark *contra* Cairncross.—The adjunction of a penalty in a minute, in case of failzie, resolves not the contract, as if the same had been to come in place of perfecting the minute, but notwithstanding the penalty, the parties may seek implement of the minute by and attour the penalty. Auchinleck, (*Penalty*) 28th March 1627, Aiton *contra* Paterson. Durie, 5th March 1634, Murray *contra* Lord Blantyre.—The offering of a penalty does not resolve, irritate or annul the contract to which it is adjoined, and the adding of that clause, *By and attour performance* is superfluous and only *ob majorem cautelam*; so that it does not make the obligation alternative, either to perform or pay the penalty. Fountainhall, 27th December 1695, Beattie *contra* Lambie.—The Lords acquitted one of many contractors, who had refiled, he paying the penalty, the words *By and attour performance* not being adjoined thereto. Fountainhall, 9th January 1702, Cochran *contra* Lord Montgomery.—One having become bound to procure a disposition from a third party in favours of the pursuer, under the penalty of 100 merks in case of failzie, but without the clause *By and attour implement of the premisses*; the Lords found him liable, in case of not performance, for the penalty only. Forbes, 27th July 1706, Bairdner *contra* Drysdale.

Penalty how
far a prefera-
ble debt in a
competition?

A BANKRUPT estate being sold by roup, and the creditors ranked, and the preferable creditors claiming payment, not only of their principal and annualrents, but also of the penalties which would cut off posterior creditors, who therefore petitioning, that principal and annualrents might be allowed to each creditor, conform to his preference, before any got their penalties, and then the superplus to be divided equally among them for their penalties; the Lords refused it in this case, especially because here the decret of ranking being extracted, it was not *debito tempore* craved. Fountainhall, 24th February 1697, Kincaid *contra* creditors on the estate of Cockburn.—In the ranking of the creditors on the same estate, this question occurring, *viz.* Whether infeftments of annualrent were preferable, not only *quoad* the principal sums and annualrents, but also for the penalties and termly failzies, at least for the debursed expences, to be modified by the Lords; Their Lordships found, That the annualrenters had no action in law against the purchaser of the estate to force him to pay the penalties; but then they likewise found, That the purchaser could not force the annualrenters to denude or convey their rights, till they were satisfied of all. The author adds, That tho' this may prove a loss to posterior creditors, yet 'tis partly helped by act 6, parl. 1695, touching consignation in the town of Edinburgh's hands; in which case infefters, rather than let their money ly at three *per cent.* will probably think fit to

to accept of their principal and annualrents. Fountainhall, 4th July 1700, Creditors of Cockburn competing.

A COMPRISING was reduced *quoad* the legal, and found only a security for the sums therein contained, because altho' the comprising defaulted a part of the sums as paid, yet it was led for the whole penalty, tho' it was alledged, That *pæna est jus indivisibile*, so that as long as any part of the sum is resting, the whole penalty may, in rigour of law, be exacted. Fountainhall, 28th July 1688, Learmont *contra* Gordon.

If the whole penalty can be sought where part of the debt is paid?

PENSION.

A PENSION out of a coal was found real, and therefore the Lords granted letters for poinding of the coals win, and to be win. Hope, (Coal-beughs) ult. June 1614, Anderson *contra* M'Aulay. — A pension being granted by a Nobleman, and the pensioner having obtained decreets for the same, and possessing several years; the Lords, nevertheless, found, That a party who afterwards comprised the lands out of which the pension was payable, was not bound to restore the duties to the pensioner, and that the pension being granted by a laick, was not real, so as to affect the ground against a singular successor, but could only produce personal action against the granter. Durie, 9th July 1629, Urquhart *contra* Earl Caithness. — A pension of victual out of lands, made by a laick, was found no real right, but a personal obligation, not binding upon singular successors. Gilmour, July, Stair, 11th December 1662, Clapperton *contra* Lady Ednem.

When real, when personal?

A GIFT of an ecclesiastick pension was found valid, altho' it took not effect by possession during the life of the donor. Colvil, February 1588, Stewart *contra* Douglas. — A gift of pension by a bishop, without consent of the chapter, being clothed with possession, was found to subsist during the bishop's life. Haddington, March 1593, Hutcheson *contra* Keir. — A prelate having granted a pension out of his patrimony, not only *cum potestate transferendi, etiam in articulo mortis*, but with the same power to the assigney; this pension, tho' manifestly given in prejudice of the successors of the granter, and in diminution of the rental, and hurt of the kirk, was yet sustained. Durie, 23d July 1625, Minister of Kirkliston *contra* Whitelaw. — A bishop having constituted a pension to a man out of his patrimony, during the pensioner's life, with power to assign the same at any time before his death; and he having possessed the same, and thereafter assign'd it within a year or two of his decease, but still retaining possession; upon the assigney's claiming the pension after the cedent's death, the Lords preferred the bishop's successor in office, upon act 139, parl. 1592, because the assigney neither intimated his right nor attained possession during the cedent's life. Durie, penult. June 1622, bishop of Aberdeen *contra* his tenants. Spotiswood, (Pension) Durie, 17th December 1628, Chalmers *contra* Ld. Cragievar.

Ecclesiastick Fe-pensions how far sustained?

If the granter of a pension is bound to personal services?

IN pensions of loads of coals, quantities of corn, and things of that nature, the Lords found that the granter is not obliged to carry them home to the pensioner, unless the pension be so expressly granted, but that he is only bound to deliver them at the coal-hill, barn-floor, &c. *Durie, penult. February 1623, Paip contra Ld. Wolmet.*

IF a pension falls by failure of the cause for which granted? See Implied Condition.

A PENSIONER dying, what interest his executors have? See Term legal and conventional.

P E R I C U L U M.

*Periculum
rei vendite.*

THE peril of a house sold, and thereafter burnt, was found to be the buyer's, tho' the disposition bore an obligation to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was infest before the burning. *Stair, 13th December 1667, Hunter contra Willsons.* — A house bought being burnt, the Lords found, That the property being transferred to the buyer, by his being infest, and the keys being offered to him, the accidental loss must follow the buyer, altho' there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. *Home, February 1685, Atchison contra Dickson.* — A tierce of brandy being to be delivered at a merchant's shop in Edinburgh, and it being seiz'd as run goods, so that the buyer was constrained to redeem it, by paying treble excise; in the question, On whose peril the brandy was, the Lords found, That it was on the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh. *Fountainhall, 25th January 1687, Spence and Watson contra Ormiston.* — A woman having, in her contract of marriage, assign'd to her husband her share of a ship, with this quality, That in case of no children, she should have the fee of the half, and liferent of the whole; and he dying without children, and the ship being casually burnt, the Lords found, That tho' she was not proprietor, yet being *credetrix speciei*, and that very species perishing, the loss must fall upon her, and that neither her husband's heir nor executor were bound to make it up; but there being some remains of the wreck preserved after the burning, they found that she might claim her share in these. *Fountainhall, 13th June 1711, Linklater contra Boswell.*

*Periculum
rei locatae.*

A MASTER of a grass park having set up a placad over the publick gate, certifying, That he was not to undertake the hazard of the horses and other cattle grazed there, was found free, a horse being amissing, tho' he did not pretend, when the horse was delivered to his servant, that there was any communing about that placad. *Stair, 16th November 1667, Whitehead contra Straiton.* *Fountainhall, 20th February 1684, Maxwell contra Todridge.* *Fountainhall, 21st December 1680, Birnie contra Keeper of Holyroodhouse park.*

A PARTY'S

A PARTY's carrying a horse farther than the place he was hired to, was found relevant to make him liable for the price of the horse and profits. *Periculum rei commodate.*
 Nicolson, (*Locatio*) penult. June 1624, Moffat *contra* Moffat. — The magistrates of Aberbrothwick borrowed three great guns for the defence of their town, obliging themselves, *in case of hurt, skaith or damage to the guns, to make payment of L. 500, as the price agreed upon for them*; the guns having perished *casu fortuito*, the borrowers were not found liable, tho' it was argued, That this was a *commodatum æstimatum*, which transfers every hazard upon the buyer. Stair, Gofford, 17th November 1668, Duncan *contra* Town of Aberbrothwick. — A decret being obtained against a man for a horse (or his price) which he had hired; and the reason of suspension being, That the horse was stol'n out of the stable where he was put, and which was neither *dolus* nor *culpa* of the suspender, but *casus fortuitus*; the Lords found the reason of suspension relevant to assilzie the suspender, That he did deliver the horse to the keeper of a common stable, to be kept there, and that the horse was stol'n out of that stable. Fountainhall, 28th February 1688, Buchanan *contra* Trotter. — But one who had hired a horse to a certain place, was found liable for the price, in respect he had not returned him, but left him at that place, from which he was stol'n or stray'd, tho' without his knowledge. Durie, 28th November 1626, *contra* Mowat. — In a pursuit for the hire of a horse, it was alledged for the defender, That he having rode him the length of Dunbar, in company with others, very soberly, the horse fell sick and lame, so as he was forced to leave him there, which he intimated to the hirer; the Lords found the defender free of the hire, and the charges of the horse at Dunbar. Hircus, (*Summons*) June 1687, Johnston *contra* Rankin.

A PERSON having received a sum, with a commission to lodge it in the hands of a merchant beyond seas for buying of goods, and he not finding the merchant there; and therefore bringing back the money with his own money, and all being lost together by shipwrack; the Lord assilzied the mandatar, altho' it was alledged, that other merchants there offered to take the money *cum omni periculo*, and give so much for exchange; and this because he alledged, that to have done so was *excedere fines mandati*. Colvil, July 1583, Anderson *contra* . — A skipper being freighted to a port with goods, and having got a mandat to bring home other goods with the money they yielded; and he being drove into a port of another country, by stress of weather, and there selling off the goods, and buying goods of another kind than what was contained in his mandat, for the mandant's behoof; and being taken in the way coming home by pirates, the Lords found, That altho' the skipper might be excused for not fulfilling his first commission *in terminis*, yet, as to buying there the goods not commissioned, and embarking the same for the mandant's use, for which he had no order, he was to be considered as *negotiorum gestor*, and upon his own hazard, and could not prejudice the pursuer by disposing of his money, unless he could say, That *gessit utiliter* both *consilio* & *eventu*, seeing he might have secured the money in factors hands, or transmitted it by bills. Dirleton, 4th June 1675, Hay *contra* Gray. — A skipper being ordered by a merchant to sell a parcel of goods, at the port he was going to; and having accordingly sold them, *Vol. II* *P*

*Betwixt
mandant and
mandatar.*

them, but without advising his constituent, having bought other goods with the money, and the ship being taken by the way; the Lords found, That the skipper, having exceeded his commission, was liable for the prices of the goods, tho' sea-risque, &c. was excepted in his commission. Bruce's MS. 28th July 1716, Young *contra* Finlay.— A factor at Rochel having received a cargo of salmon from his correspondent here, to be sold there; and having, instead thereof, sent them to Bilboa in Spain, in hopes of a better mercat, tho' it proved otherwise; the Lords, in a pursuit at the factor's instance for payment of a bill of exchange, found, That he had exceeded the *finis mandati*, in not selling the salmon at Rochel; and therefore affoizied from exchange and re-exchange, but ordained him to be heard touching the annualrent. Fountainhall, 8th July 1687, Alexander *contra* Calder.— The Lords found, That a *mandatarius* (who, in the present case, was both skipper and supercargo constituted by the merchants) trusting another, did not exactly comply with the terms of his mandat, but followed the faith of that other upon his own peril, and was liable for the event, tho' there was neither *dolus* nor *lata culpa* chargeable on the *mandatarius*, but that any negligence and omission lay at his door; because, in the like cases, *electa est industria personæ*; so that here law forbids him not to substitute, only if he do, he must take his hazard of the event. Fountainhall, 12th November 1696, M'Niel and others *contra* Dawling.— A party having accepted a bill of exchange for a certain sum, as the price of a part of a ship he had commissioned the drawer to buy for him, payable to the drawer or order, upon his delivering a vendition to the acceptor; the Lords found the sum in the bill due, altho' the ship was bought by the drawer in his own name, and he never offered to transmit the vendition to the constituent, till some time after, that the ship came to be damnified by a disaster, the constituent never having offered the money, or demanded the vendition. Forbes, 2d January 1711, Gibson *contra* Leith.— A banker at Edinburgh, who got orders to remit his correspondent's money, by a bill upon the bank of England, chusing rather to remit it by a bill upon a private banker at London; and the bill being taken out of the post-house by some unknown person, who, upon a false indorsation and receipt, got the money from the banker upon whom the bill was drawn; the Lords found the defender's remittance by bill, on the private banker, was on his own risque and hazard. 18th June 1730, Selwyne *contra* Arbuthnot.— A merchant who had sold some wine, being desired by the buyer to purchase for him a cask to put it in, to be carried to the north by sea; and the cask having proved so insufficient, that the wine run all out by the way; in a process for damages, the Lords found the merchant liable to restore the price of the wine. Fountainhall, 7th March 1707, Lord Inverury *contra* Gordon.

Proprietar
and custodiar

A BURGESS of Edinburgh, who had a country house some miles from the town, was in use, when his family was not there, to trust the key of his outer-door with his gardener; some goods in a chest of drawers, to the value of L. 5 being stolen, while the master was in town, the servant was found liable for the same, tho' it was not pretended, that he, or any of his family had committed the theft; and tho' it was pleaded for him, That he was liable in no sort of diligence further than to keep the outer-door locked: But the Lords went upon this
this

this circumstance, that he had been *versans in illicito*, in so far as one night he had lodged a travelling packman in the house, which they thought sufficient to throw the burden upon him, tho' he made out clearly, that the packman could not be the person who stole the goods. 21st December 1734, John Campbell Taylor in Edinburgh *contra* Charles M'Clarín.

WHEN goods in a ship are spoil'd, not by stress of weather, or any such extrinsec accident, but from the failure and insufficiency of the ship itself, the hazard lies upon the skipper, who must have his ship sufficient at his peril. ^{Between merchant and skipper.} Stair, 7th November 1677, Laury *contra* Angus. Fountainhall, 24th July 1680, Lamont *contra* Boswell. — In a process for freight, alledged no freight due, because 'tis an uncontroverted maxim in maritim law, *quod naufragio facto, naulum non debetur*. Answered, The skipper cannot answer for this *casus fortuitus*, and tho' the ship was broken, yet the goods were safe. The Lords found the freight due, deducing as much thereof as the merchant should instruct he was damnified in by the landing of the ship in the place where she broke; and they computed the damage by comparing the price of the cargo as it was sold in the place where it was cast in, with the prices it would have given in Aberdeen, which was the port to which they designed. Fountainhall, 30th July 1680, Lumisden *contra* Lorimer. — By charter party, a shipmaster having become bound to transport a loading of tobacco from Virginia to Port-Glasgow, and the merchant to pay a certain freight *per tun*; the ship in her return was wrack'd on the coast of Ireland, but most of the cargo was saved and got upon shore, some of it much damnified. So soon as the freighter got notice of this disaster, he sent an agent to Ireland, who, upon paying salvage, got the goods delivered to him; some of them he ship'd for Bristol, in order to be abandon'd to the insurers, the remainder he carried straight to Glasgow. In a process for the freight, the Lords found, That the contract of affreightment was dissolv'd by the total loss of the ship, albeit some of the shipwrack'd goods were saved out of the shipwrack, and that the freighters indorsing the bill of loading to the insurers, did not subject the freighters to any freight for the goods recovered by the insurers, but found the merchant liable for the freight *pro rata itineris* of such of the goods as were brought to Glasgow, notwithstanding that part of the tobaccos was found damnified and burnt there. 12th February 1732, Lutwidge *contra* Gray.

By the tenor of a reversion, the money being to be consigned in a responfal landed man's hands, without mentioning any in particular; the Lords found the consignment to be *periculo* of the consigner. ^{Hazard of consigned money.} Auchinleck, (*Reversion*) 7th December 1631, Grierfon *contra* Gordon. — Consignation is upon the peril of the party by whose fault it happens; and therefore a sum consigned in the hands of the clerk of the bills, who became afterwards insolvent, was found to be upon the charger, in so far as it was instructed by an instrument produced, that the suspender offered the annualrent, and so much of the penalty as the charger should declare upon oath that he had truly expended, which he refused unless the whole penalty were paid, which occasioned the consignation. Stair, 28th July 1665, Scot *contra* Somervell. — A debtor being charged for more than was due, he was not found ob-

liged to offer what was truly due, but was found to be *in bona fide* to consign the whole sum charged for ; and that, having consigned warrantably *sine culpa*, the peril of the consignment was upon the charger. Stair, 15th February 1673, Mowat *contra* Lockhart. — In a question, Who should bear the charges of consignment, the creditor having charged for no more than the original debt ; it was found, That the debtor ought to have offered what was due, and shown the discharges of what was paid, and, upon refusal, have consigned, otherwise that the suspension was not warrantable, and therefore that he should bear the burden of consignment. Stair, 9th July 1675, Earl Queensberry *contra* Duke of Buccleugh.

Master and
tenant.

LANDS being set in tack, and thereafter overblown with sand, the tenant was found to have action to compel the setter either to diminish the duty proportionally, or suffer him to renounce the tack. Haddington, 13th June 1612, Lindfay *contra* Home. — A house becoming insufficient by an accident, without the proprietor's fault, this was found not relevant to liberate from the rent, unless the tacksmen had abstained to possess, but found relevant to abate the rent in so far as he was damnified. Stair, 2d January 1667, Hamilton *contra* .
 ---- The Lords allowed abatement to the subtacksmen of the border customs for the year 1650, because of the English invasion that year, which stopped all commerce ; and as to the *quatenus*, there having been commerce with England for some months of that year, they abated one half of the duty. Dirleton, 20th November 1667, Tacksmen of the customs *contra* Greenhead. — A supervenient law having diminished the tacksmen's profits ; it was decided by the Lords, That this did not irritate the tack, but only afforded ground to ask an abatement, tho' the King was the setter. Fountainhall, 2d July 1696, Crawford *contra* King's advocate. ---- A mill being set with the multures thereto belonging, which, at the date of the tack, were considerable ; but a declarator of immunity being obtained by several persons who were thought to be thirled, the Lords, notwithstanding, refused any abatement of the tack-duty. Forbes, 1st July 1709, Heriot's Hospital *contra* Angus. ---- A coal being set in three years tack, and only such a number of coaliers to work, and so much for each of them to be paid, and the coal utterly failing in the end of the second year ; the Lords sustained the reason of suspension in this circumstantial case, and found it not such a bargain of hazard as to subject the tacksmen to the tack-duty, seeing he had not exceeded the number of coaliers, and if he had put in any one, he was proportionally to have augmented the rent : So that it appeared to have been the meaning of parties, that the coal ceasing, the tack should also fall. Fountainhall, 16th June 1699, Wilson *contra* Mather. ---- The landlord of an upper tenement, having until'd the house, in order to raise it a story higher ; in a pursuit, at the instance of the landlord of the under tenement, against his own tenant for the rent, the Lords sustained the tenant's damages as a good defence, and found, That the damage having proceeded from the natural quality of the inferior tenement, and that the heretor of the upper tenement was not liable for the same ; therefore found the landlord of the under tenement liable to his tenant for damages. Marcus, (*Tacks*) Falconer, Home, 15th December 1681, Deans *contra* Abercrombie. But thereafter it being pleaded for the pursuer, That any damage sustained
 by

by the defender was casual, and not by the pursuer's fault, and that every person must bear with the misfortune that falls upon himself, without the fault of another; the Lords decerned for the whole rent, without deduction of any damages. *Harcus, (Tacks) 8th December 1687, inter eosdem.* --- And lastly, It being alledged, That the pursuer consented to the reparations, in that he was present at the Dean of Guild's visitation, and did not reclaim; and also it being alledged against the landlord of the upper tenement, That his reparations were not necessary or ordinary reparations, he having taken off the roof, raised the walls, and added a good story with a flat roof, which occasioned the rain to damnify the defender's plenishing and his wines, and to put a stop to his business for the space of three or four months; the Lords found the pursuer, and the landlord of the upper tenement, liable for the defender's damages. *Harcus, (Tacks) January 1688, inter eosdem.*

A TENEMENT, out of which an annualrent was payable, being laid waste several years, deduction was sought by a singular successor in the tenement, of these years annualrents, as is frequently done in feu-duties. Answered, Tho' in some cases feu-duties cease by devastation, this was never extended to annualrents due for the profit of a stock of money. The defence was repelled. *Stair, 26th June 1662, Adamson contra Lord Balmerino.* --- The Lords found, That by the act 10, parl. 1551, an annualrenter must suffer a proportional abatement when a tenement is burnt and rebuilt by the proprietor, the annualrenter contributing nothing thereto; and found it not sufficient for the annualrenter to say, That the value of the waste ground was worth the annualrent; but found it relevant to sustain the whole annualrent, that the annualrenter offered to contribute with the heretors to the rebuilding, and was not admitted. *Home, January 1686, Monteith contra Anderson.*

Creditor, if he runs any hazard of the subject burdened with his debt?

A WIFE being infest in an annuity out of a tenement of land, the Lords found the husband's heir liable to make it habitable; and it becoming ruinous, they found him personally liable for that annuity till it should be rebuilt. *Falconer, 4th January, Home, March 1682, Wilkie contra Morison* --- A jointure-house being burnt *casu fortuito*, the Lords found the heir not liable to rebuild the same. *Stair, 2d February 1672, Guthrie contra Ld. M'Kerston.* --- A house in the possession of a liferentrix, with many others about, having been casually burnt, the Lords found the heretor liable in no more but the annualrent of the sum to which the price of the waste ground was liquidated, and at which the heretor had sold it, and for this they decerned during the woman's life. *Fountainhall, 15th December 1704, Adamson contra Nicolson.*

Fiar and liferenter.

It being expressed in a clause of reversion, That the lands should be redeemable upon payment of a certain number of pieces of gold, and in the *interim* the value of these pieces being raised by authority; the Lords found, That the *superplus cedit lucro venditoris*. *Balfour, (Reversion) 12th May 1540, Foulis contra Craig.* --- The value imposed upon money by publick authority is the only thing considered in payments, and not the metal of which it is made; at the same time, it is not at the time of contracting the debt that the value of the money

Hazard of rising or falling of money.

is to be considered, but the time of payment ; and therefore when the value of the coin is augmented or diminished, the profit or loss is the debtor's, and not the creditor's. 6th February 1731, *Hamilton contra Corbet*.

Teind, where
the stock is
destroyed.

TEINDS of corn were found not due where the stock was destroyed *vi majore*. Balfour, (*Teinds*) 29th July 1563. The Chapter of Glasgow *contra* Cessford. 19th December 1549, Abbot of Holyrood-house *contra* Monipenny. 20th January 1549, *Idem contra* Ld. Innerleith.

Multure,
where the
ground is de-
stroyed.

THE half of a piece of ground, which paid a certain quantity of dry multure, being destroyed by water, and a proportional deduction of dry multure being claimed upon that account ; the Lords thought, that if only a small part had been lost, it would not have deserved any consideration, but being an *interitus rei* to the half of the subject, they therefore, before answer, appointed the quantity of the loss to be proved. Fountainhall, 9th December 1702, Aitken *contra* Tenants of Halywood.

PERSONAL and REAL.

Debita fundi.

THE aliment of a ward minor was found *debitum fundi*, so that he might pursue the tenants and occupiers of the lands for the same. Colvil, August 1590, Ld. St. Monans *contra* Tenants.

THE retoured duties which are only due before citation in the general declarator of nonentry, are *debita fundi* ; but the superior's claim to the full duties thereafter, is only by a personal action against intro-metters. Dirleton, 23d June, Stair, 16th July 1675, Ld. of Kelhead *contra* his vassals.

THE casualty of marriage is *debitum fundi*. Durie, 14th November 1635, Dickson *contra* Donatar.

THE casualty of relief is *debitum fundi*. Durie, Spotiswood, (*Fiscus*) 12th March 1628, Ld. St. Clova *contra* old Ld. of Lawriefton.

ONE heretor pursuing another for dry multures, and the defender deponing in the cause, That for the years he possessed he had left the dry multures in the tenant's hands ; yet the Lords, at advising this oath, found it *debitum fundi*, and decerned against him. Fountainhall, 3d December 1687, Earl Southesk *contra* Maxwell.

SINGULAR successors are not liable for the reparations bestowed upon the minister's manse before they were heretors. Stair, Gosford, 8th January 1670, Charteris *contra* Parishioners of Currie. Stair, Gosford, 2d February 1672, Guthrie *contra* Ld. of M'Kerston. Dirleton, 23d June 1675, Hamilton *contra* Maxwell. Dirleton, Gosford, 6th July 1676, Blair *contra* Fowler. Fountainhall, 2d February 1694, Moir *contra* Lord Salton.

THE heretor whose lands are designed for a glebe to a minister, has, by the act of parliament, a proportional relief off the other heretors ; but this relief affects only the heretor for the time, not his singular successor,

successor, as not being *debitum fundi*. Stair, 24th June 1675, Snow *contra* Hamilton.

LAND-TAX not *debitum fundi*, and therefore not good against singular successors. Stair, 13th July 1664, Græme *contra* Heretors of Clackmannan.

OBJECTED against a registered reversion, that not being *pactum de retro vendendo*, which is the true nature of a reversion, but granted to a third party who never had right to the lands, the same cannot be good against singular successors. This objection repelled. Stair, 16th January 1679, Ld. Lamberton *contra* Lady Plendergaist. Reversions;

HE who had right to a reversion having thereafter borrowed more money from the wadsetter, and given him his obligation, that the reversion should not be made use of by him, his heirs or assignies, till that sum were paid, as well as the sum in the reversion; and having thereafter disposed the said reversion, and the assigney having used the order thereupon, and insisting for redemption; the Lords had no respect to that second obligation, but declared the lands lawfully redeemed. Maitland, 18th December 1565, Home *contra* Home. — An improper wadsetter having become cautioner for the reverser to a third party, obtained from the reverser a declaration, "That the wadset should not be redeemed until he were also relieved of this engagement." In a competition betwixt the wadsetter and another real creditor, the Lords found, That this was but a personal obligation, and not a proper eik to the reversion, so as to become a real right and title for possession; therefore found the wadset extinguished by intromission with rents, to the amount of the wadset sum and annualrents; tho' here the common debtor was bankrupt, and the wadsetter had no other security for his relief. Fountainhall, Forbes, 18th February 1708, Lord President *contra* Inglis. Eiks to re-
versions.

A LIFERENTRIX of a sum disposing the same to her son the fiar, and taking backbond of the same date, the same writer, witnesses, &c. obliging him to relieve her of his father's debts, otherwise to repone her; the son having assigned the sum, and the assigney pursuing the debtor, and comparance being made for the mother, her alledgeance upon the backbond was repelled, and found, That it could not prejudice the pursuer a singular successor, but could only work against the granter himself. Durie, 21st July 1636, King *contra* Douglas. — A party being obliged to pay money when required; which requisition was to be made with consent of some persons named in the obligation, and no otherwise; the bond being comprised by a creditor, who thereafter made requisition, and charged; the Lords found, That the compriser, singular successor to the creditor in the bond, was not subject to that clause to make requisition with consent of these friends, the clause being insert for personal respects: But here execution was delayed until a term thereafter, against which the debtor might prepare the money. Durie, 24th March 1630, Maxwell *contra* Lord Herries. Pactions, de-
clarations, &c.
by backbond
or otherwise,
with relation
to personal
rights, when
real, when per-
sonal?

ONE having granted bond, bearing borrowed money, obtained from the creditor a backbond, narrating, That the bond was for the price of certain lands, and that the sum should not be payable till the writs

of the lands were delivered; this backbond was found good against an assigney to the bond. Stair, 14th January 1663, Scot *contra* Montgomery. — One having filled up a trustee's name in a blank bond, and taking a backbond of trust; this was found good against the trustee's creditor arresting the sum in the debtor's hands. Stair, 5th February 1678, Mackenzie *contra* Watson. — The like in the case of an assignation, qualified by a backbond of trust. Fountainhall, Forbes, 8th November 1710, Monteith *contra* Douglas. — Found also good against an onerous assigney. Durie, 23d December 1635, Keith *contra* Irvine. — A bill being indorsed to one, upon his giving backbond to apply the money to a certain use; the backbond was found so to affect the money, as it could not be arrested by the creditors of the indorsee. Forbes, Fountainhall, 19th July 1705, Black *contra* Creditors of Steil.

Pactions, declarations, &c. by backbond or otherwise, qualifying real rights.

AN appriser infest having obliged himself to communicate whatever profit should arise to him by his apprising out of the common debtor's estate; this paction was found not good against a singular successor in the apprising. Stair, 6th July 1661, Tailzifer *contra* Maxton. — A backbond of an appriser before he was infest, renouncing all benefit of his apprising, and discharging the same in so far as prejudicial to another party's right, was found effectual against a singular successor, tho' never registred. Stair, 31st July 1666, Earl Southesk *contra* Marquis of Huntley. — A backbond of trust granted by an appriser, was found to affect the apprising against singular successors, there being no infestment in this case. Stair, 21st November 1673, Brown *contra* Gairn. — An assigney to a decret of apprising granting a backbond, obliging him to denude upon payment of a certain sum; the same was found good against an onerous assigney, the legal being still current, and no infestment upon the apprising. Stair, 6th July 1676, Gordon *contra* Cheyne. — A backbond of trust found to qualify an apprising deduced by the trustee, and conveyed by him before infestment to a singular successor, who was thereafter infest, so as to found an exception to the debtor, that the apprising was extinguished by payment made to the intruster. Gosford, Stair, 12th July 1670, Kennedy *contra* Cunningham. — An appriser having restricted his apprising to certain lands, and the restriction being objected to a singular successor infest upon the apprising; found, That if infestment had followed upon the apprising before restriction, the restriction was but personal; but if it preceeded infestment, it did affect and regulate the apprising against the singular successor, because till infestment the apprising was transmissible by assignation. Marcus, (*Comprisings*) January 1685, Sinclair *contra* Sinclair. — A disponee to an infestment of annualrent having granted backbond to the disponent, retrocessing the liferent thereof; and thereafter having infest himself in the annualrent-right upon the procuratory of resignation contained in his disposition, a singular successor from him was found not liable to implement his backbond, tho' by virtue thereof the disponent had all along continued in the possession of the annualrent. Durie, 10th March 1629, Schaw *contra* Kinross. — A trustee, to whom an heretable bond was assigned in order to lead an adjudication, and who granted a backbond declaring the trust, having, after leading the adjudication, borrowed money from a third party, and conveyed the heretable bond in security; upon which conveyance

conveyance the third party was infeft, in virtue of the precept of fafine in the heretable bond, in a competition with the original creditor in whose favours the backbond was granted, and who pleaded, That the trustee was not in the right of the bond, and could not transfer the property which he had not; the Lords preferred the third party, as having lent her money on the faith of the heretable bond. Dalrymple, 20th July 1715, M'Cubbines *contra* Fergusson.

A BACKBOND under a superior's hand, declaring, That the vassal should have liberty to renounce his feu-right when he pleased, was found effectual against a singular successor in the superiority, it being of the same date with the feudal-contract, and relating to a matter intrinsic in the nature of the feu. Stair, 12th February 1669, Brown *contra* Sibbald. A backbond of trust is not effectual against a singular successor by infeftment in lands, unless either he knew of the backbond, or paid no money for the purchase. Stair, 20th November 1672, Workman *contra* Crawford. — A party having got a disposition to a tenement in a burgh upon trust, and only to make him capable to be elected Commissioner for that burgh to the parliament, the disposer also having continued in possession during his life; but after his death the trustee having sold the subject for an adequate price, the Lords, in a declarator of trust at the instance of the defunct's heir, found, That the purchaser having acquired it by an onerous title equivalent to the true value, the trust could not affect his right, it not being a *vitium reale*. Fountainhall, 14th November 1702, Anderson *contra* Dempster. — A mill being feued, and the author having given a bond apart at the constitution of the feu, binding him to lead the millstones when required, on pain of losing a year's feu-duty; and the singular successor being required, and failing, the Lords affoizied him, because this was a bond *extra corpus juris*, and so could not bind a singular successor in the right of the feu. Durie, *penult.* January 1639, Cockburn *contra* Trotters.

THE estate of Grange being in the Lord Forrester's person, under backbond, bearing, *That the infeftment was in trust for the use and behoof of the Laird of Grange, and only to the Lord Forrester's behoof for the relief of debts he should be engaged in for Grange*; after Lord Forrester's death the estate of Grange was allowed to be adjudged for his debt, but always with the burden of the said backbond. Stair, 23d November 1664, Livingston *contra* Lady Forrester. — A trustee in a disposition to lands in order to sell them, having given a backbond to the disposer to hold compt for the price; the Lords, in a competition betwixt the trustee's creditors and those of the disposer, preferred the later, tho' the disposer was never infeft. Bruce, 14th July 1715, Burgh of Finmouth *contra* Forbes.

A BACKBOND granted at passing the gift of ward and marriage, and registred in the books of exchequer, found to affect the gift in the person of a singular successor. Stair, 31st January 1666, Dallas *contra* Fraser.

THE author's backond found good against the singular successor in a tack, altho' it neither was registred nor intimated to him before his right. Stair, 4th January 1668, Forbes *contra* . — A tack contain-

ing a tack-duty and definite endurance, bore this clause, "That the tacksmen should repair the tenement which was then ruinous, and should retain the expences of reparation out of the tack-duty;" the

Lords found this clause personal, and not effectual against a singular successor, who had bought the tenement, and paid an adequate value for the same after it was repaired. Stair, Fountainhall, 5th February 1680, *Rae contra Finlayson*.

Clauses burdening conveyances.

A PROCURATORY of resignation being disposed by a father to his apparent heir, with the express provision, *That the subject should be burdened with a sum named, in favours of the rest of the children*, whereupon the heir was infeft; the Lords preferred the children to all comprisers for debts contracted thereafter. Gosford, 20th February 1673, *Morison contra Creditors of Darrie*.

THE Lords found, That a clause in a disposition, bearing, *That it was given and accepted with the burden of a sum to be paid to another*, is not merely personal, but real, against any who succeed in that right. Fountainhall, 14th December 1698, *Countess of Rothes contra French*.

A PURCHASER of lands having obliged himself to pay a certain sum to any person his author should please to nominate; this clause, tho' in the infeftment, was found not real to affect singular successors. Stair, 25th June 1664, *Canham contra Adamson*. — A disposition, bearing, both in the procuratory of resignation and precept of sasine, this clause, *That the receiver should be obliged to pay all the disponer's debts contracted and to be contracted*, was found to import no more but a personal obligation upon the receiver to pay the debts, but not to affect the lands disposed. Falconer, Fountainhall, 19th November 1685, *Lord Ballenden contra Dundas*. — One having disposed his estate to his eldest son, with this provision, *That he should make payment to the younger children of their bonds of provision therein set forth*; as also, reserving power to the granter to burden his son, and the lands disposed, with the payment of what further sums he should destinate for the provisions of his children, and to alter or innovate the disposition at his pleasure; and he having died without making any further provisions, the Lords were of opinion, That such a provision in favours of children, tho' contained in the infeftment, is not a real burden, but personal only against the acceptor of the disposition; yet in this circumstantiated case they found the provisions real, in regard of the posterior clause, burdening the subject with what additional provisions the granter should think proper, and therefore good against the son's real creditors. Fountainhall, 14th June, Home, July 1687, *Creditors of Marjoribanks competing*.

A PARTY disposing lands, with a provision in *græmio* both of disposition and sasine, *that a sum should be paid to the disponer, and, in case of non-payment, the right to be void*; the Lords found, That the clause was real, and good against singular successors. Dirleton, Stair, 7th November 1666, *Cuming contra Johnston*.

A DISPOSITION of lands being granted, *with and under the burden of the payment of all the lawful debts*; it was contended that this was only a personal clause, burdening the acceptor of the disposition with payment of the debts, but not designed to make a real burden upon the lands. Answered, It is not presumed of any disponer, that he intends different things, when he says, *with the burden of debts*, and *with the burden of payment of debts*; it is not disputed but the first makes a real burden, and so must the other. The Lords found it a real

a real burden. July 1719, Creditors of Coxton *contra* Duff. — In a disposition by a father to a son, the question arose, If the father's debts were a burden upon the right, so as to be good against singular successors, or only a personal burden upon the disponee and his heirs? In the dispositive part, the clause was worded thus, *Likeas, by acceptation hereof, the said George binds and obliges him, and his foresaids, to make payment to my lawful creditors of all my just debts:* And in the procuratory of resignation, *And the said George shall be obliged to pay to my creditors my just and lawful debts, &c.* But in the clause of warrandice it stood thus, *Which right I bind and oblige me to warrant from my own proper fact and deed, with the burden of my debts:* And in the precept of sasine, *Under the reservation of my own liferent, and with the burden of my just and lawful debts.* The father's debts were here found a real burden upon the subject disposed, and good against singular successors, tho' it was argued to be most express in the dispositive clause and procuratory, that this was a personal burden only upon the acceptor, and that the subsequent clauses must be understood of the burden, as described at large in the foregoing principal clauses of the writ, a personal burden being as truly a burden in its nature as a real burden. 18th February 1729, Competition betwixt Geddes and Younger. — In a disposition of a land estate by the proprietor to his eldest son, there was insert the following clause, *As also these presents are granted, with the express burden of the payment of 8000 merks, which the said James my son, by acceptation hereof, binds and obliges him to content and pay to John, Gilbert, &c. my younger children, equally amongst them;* in a competition betwixt the younger children and the creditors of the eldest son, the question was, Whether it was a personal burden only, or both a personal and real burden; The creditors pleaded, That here is a personal burden plainly established, and the clause does not necessarily import any thing further; and therefore to found upon the same clause, as also inferring a real burden, which is a right of a quite separate nature, is truly establishing rights and conveyances by conjecture and implication, contrary to the principles of law and of reason. The Lords, notwithstanding, found the above clause in the disposition made the provision real. 10th January 1738, Creditors of Smith *contra* his brothers and sisters.

AN act of the fifth of King George I. entituled, *An act for enlarging the time to determine claims on the forfeited estates*, provides, "That superiors shall be obliged to pay a proportional share of the true and lawful debts of the attainted persons, answerable to such estate as shall be found to belong to them by virtue of the clan act; upon this clause a competition arose betwixt the superior's personal creditors, affecting the rents by virtue of arrestments; and the personal creditors of the forfeiting person, whose estate it had been; in which competition, the creditors of the forfeiting person were found preferable, the estate being supposed to devolve to the superior, with the burden of the forfeiting person's debts, tho' not so expressed in the clause. 5th July 1734, Viscount of Oxenford *contra* officers of state.

Clauses burdening the subject disposed with the granter's debts in general, without mention of any particular debt, whether these debts become thereby real, debated, but not determined.

July 1730, Creditors of Calderwood competing. But thereafter it having been found in an appeal to the house of Peers, that such

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general clauses create no real burden; the Lords ever since have been in use to determine according to the judgment of the higher court.

THE Lords preferred debts with which a disposition and infeftment of an estate was burdened, to all the debts upon that estate contracted by the receiver of that disposition, but preferred them amongst themselves according to their respective diligences, and these upon which adjudication had been obtained, to such as were not adjudged for. Forbes's MS. 30th June 1714, Creditors of Ross competing. — A father disposed his estate to his son, with the burden of 5000 merks to his creditors, *conform to bonds granted to them*. After he was denuded he contracted several debts, for which he granted infeftments of annual-rent upon the lands formerly disposed to his son; in a competition betwixt a personal creditor for 1000 merks prior to the disposition, and these annualrenters, it was pleaded, *1mo*, That, by the son's infeftment, the father was denuded, and had it not in his power to lay any new burden upon the estate, over and above what he had laid upon it in favours of his creditors existing at the time of the disposition; and if the debts did not amount to 5000 merks, it was so much gain to the son. *2do*, Supposing this clause could be understood as a faculty, impowering the father to grant new securities upon the estate, so far as the 5000 merks was not exhausted by prior debts, still the debts, such as were existing before the disposition, were made real burdens upon the estate, equally as if they had been specially mentioned in the infeftment, which must prefer them to all posterior debts, tho' made real upon the estate by infeftment. It was found, That no debt posterior to the disposition could come in competition with the debts prior to the same. 12th February 1731, Barclay *contra* Gemmil.

Infeftment
for security
of debts to be
contracted.

AN infeftment granted to a creditor for security and payment not only of debts then due, but of debts that should happen to be due thereafter, was found to give no preference for debts that came to be due after the competing creditors were infeft. Bruce, 19th January 1715, M'Dowal *contra* Sir John Rutherford.

Discharges
of the superi-
or's casualties.

FOUND, That a gift granted by King James III. under his great seal, 1474, to Stewart of Craighall and his heirs, of all the wards that should fall by the superiors of Craighall's lands, was now expired and null, and could only serve, at the most, during the life of the giver thereof, the King. Haddington, 1st February 1610, Sir George Erskine *contra* Ld. Craighall. — A feu-right being granted, with a clause discharging the feu-duties in all time coming; this clause was found not effectual against a singular successor in the superiority. Stair, 19th November 1679, Lady Blackbarony *contra* Borrowmans. — See a simular case. Stair, 9th December 1679, Lord Haltoun *contra* Town of Dundee. — A superior, by a writ under his hand, having renounced and discharged in favour of a vassal all the feu-duties and other casualties of the superiority, thirlage to his miln, &c. in a declarator at the vassal's instance against the superior's son, who refused to represent him, the Lords unanimously agreed, That such a perpetual discharge of the casualties and astringtion, was merely personal, and only binding during the granter's life, but could not operate against a singular successor. Fountainhall, 8th December 1699, Pringle *contra* Earl of Home. — A proprietor having disposed part of his barony, holding

holding blench of himself, became obliged, under a penalty, to enter the heirs *gratis*, and likewise to dispone *gratis* the liferent escheats of his vassals in these lands, so oft as the same should fall into his hands: This clause was found not real against singular successors in the superiority. 11th December 1731, Lady Castlehill *contra* Sir James Stewart of Coltness. — In an original feu-charter, tho' woods were disposed along with the lands, there was this remarkable restriction laid upon the vassal, *That it shall not be leifom for him or his heirs to cut, sell or give away any of the trees, but allenarly for their own particular use and their tenants*; but this clause did not enter the sasine. The superior having afterwards, by a personal deed, discharged the said restriction, the question occurred, If this discharge was good against a singular successor in the superiority. The singular successor pleaded, That the woods here were truly reserved, and nothing given to the vassal but the *usus*, and that a discharge could not transfer the superiority, or any of its accessories. The vassal pleaded, That he was infest in the lands and woods, and that the clause was no other than a restriction on his property, calculated, that he might not interfere with his superior in the sale of his woods, to lower the price, by overstocking the mercat, and that restrictions may be discharged by any personal deed. The Lords found the discharge effectual against the singular successor. 24th July 1734, Garden of Bellamore *contra* Earl of Aboyne.

THE Lords found, That where an apparent heir buys in a comprising on his predecessor's estate, it thereby becomes not only redeemable from him within the ten years, but likewise that the reversion operates against the apparent heir's creditors and singular successors, who have adjudged his right. Fountainhall, 14th December 1698, Countess of Rothes *contra* French. Redeeming adjudications from apparent heirs and their disponees.

REDUCTION upon the head of fraud, is good against gratuitous acquirers, tho' not partakers of the fraud. Stair, 18th December 1667, Auchinleck *contra* Williamson. Fraud.

A WIFE having consented to a disposition granted by her husband, it was found relevant against the disponee, to elide the consent, That the wife offered to prove that she was compelled by her husband. Stair, 24th June 1662, Ld. Woodhead *contra* Nairne. Durie, 27th June 1632, Cassie *contra* Fleming. Force and fear.

SPUILZIE is a *vitium reale* as well as theft, and equally competent against singular successors. Stair, 21st November 1677, Hay *contra* Leonard. Spuilzie.

A RIGHT granted by a son to a father *contra fidem tabularum nuptialium*, cannot be challenged upon that head in the person of a singular successor, purchasing *bona fide* from the father. Stair, Gofford, 16th July 1672, Duff *contra* Foulter. *Paßum contra fidem.*

FOUND, That the exception of simulation of a gift of escheat, as taken upon the expence of the rebel, could not be oppon'd against an assigney, who, being a creditor, had acquired the same to his own Simulation of a gift of escheat.

own behoof, unless it were proved, That the assignation was also simulate. Hope, (*Assignation*) ult. February 1617, Earl of Tullibardin *contra* Dalziel. — Simulation of escheat cannot be opposed against a third party who acquires *bona fide*. Hope, (*Horning*) 6th July 1622, Murray *contra* Adamson.

Minority
and lesion.

REDUCTION upon minority and lesion, found not good against onerous singular successors. 25th January 1728, Gourlie *contra* Gourlie. — In a pursuit against a minor upon his bond, at the instance of an assignee, the defender having founded upon minority and lesion, which he argued must be good against onerous assignees, otherwise the benefit of restitution might be easily disappointed; the Lords found the defence not competent against the pursuer a singular successor, because in this case the cedent was solvent, against whom the defender might have recourse. Marcus (*Minority*) November 1683, Anderson *contra* Spence.

Reduction
ex capite lesi.

THE Lords reduced a disposition done *in lesio*, as being *labes realis*, tho' the defender was a singular successor, and knew nothing of its being done *in lesio*. Fountainhall, 18th December 1697, Livingston *contra* Burn.

Donatio in-
ter virum &
uxorem.

AN assignation of an heretable bond by a wife to her husband, *sancte matrimonio*, was found revocable, as *donatio inter virum & uxorem*, and that even against a singular successor, acquiring *bona fide* from the husband for onerous causes. Stair, 15th December 1676, Inglis *contra* Laury — A donation by a wife to her husband, taken in name of a trustee, was found revocable, and that even against singular successors. Stair, 17th July 1677, Paterson *contra* M'Clean.

Irritancies
must be en-
grossed in the
infestment, o-
therwise not
good against
singular suc-
cessors.

AN irritant clause, *ob non solutum canonem*, contain'd in the disposition of feu, but neither in the charter nor sasine following thereupon, is not real, nor effectual against an appriiser; 'tis otherwise, if sasine follow directly upon the disposition, in which case the disposition serves for a charter. Stair, 1st December 1664, Earl Sutherland *contra* Gordon.

AN heretable bond of relief, providing expressly, That the infestment to be expedite thereon should not be redeemable, till the cautioner therein were reimbursed of all charges and damages in general, and particularly of the expences of the said infestment, and the infestment only granted expressly for relief of certain debts therein enumerated, but referring to a charter that repeated the above obligations, was sustained to afford preference to the creditor, in a ranking for the principal sum, annualrents and expences paid by him, to any of those to whom he was engaged for the common debtor, to be stated as a principal sum at the time of the advance, but not for the expences of expediting his infestment, and supporting his right against competing creditors, because these provisions were not contained in the sasine, otherwise than as referring to the charter, which general reference, creditors or singular successors cannot be bound to take notice of. Forbes, 17th July 1706, Campbell of Calder *contra* Creditors of Park Hay. — A superior granted a feu-right to his vassal, with certain prohibitory and irritant clauses; these clauses were engross'd at full length in the charter,

charter, but not in the precept of *fasine*, nor in the *fasine* itself, otherwise than by a general reference, *sciz. With and under the provisions and conditions particularly mentioned in the charter*; it was pleaded, in a competition betwixt the superior and the creditors of the vassal, That this general reference was sufficient to interpel creditors or purchasers; for no prudent person, who lends money upon the faith of an estate in the person of his debtor, will trust to the *fasine* alone; he will, no doubt, also insist for a sight of the charter. It was found, notwithstanding, That this general reference was not sufficient against creditors or singular successors. 13th February 1730, Competition betwixt the Duke of Argyle and creditors of Barbreck. — An heiress, in her contract of marriage, having disposed to her husband her lands, and he obliging himself to infeft her in a liferent jointure out of his own lands, with this clause, That if either of them failed in the performance, the contract was to be void and null, and each party to enjoy their own; and the husband having been infeft in the wife's lands by virtue of the precept of *fasine* in the contract, but the wife having never been infeft in his lands for her jointure, and both his and hers being evicted by his creditors, the husband's right to her lands bearing *in græmio* a relation to the contract of marriage, and to be granted to him by the wife, under the provisions, restrictions, and limitations therein mentioned in general; the Lords, in a declarator of irritancy of the contract at her instance, found, That seeing this irritant resolute clause was unusual, and not inserted *verbatim* in the precept and instrument of *fasine*, but only by a general reference, it could not prejudice the singular successors; and therefore assilzied them from her declarator of irritancy. Fountainhall, 27th November 1711, Lady Montboddo *contra* Halyburton. — A father having disposed his estate to his eldest son, with the burden of certain sums to his younger children, which did not enter the precept of *fasine*, nor the *fasine* itself upon the precept, otherwise than by a general reference; the same notwithstanding was found effectual against the son's real creditors, seeing the burden was fully engrossed in the disposition, which was the warrant of the *fasine*: For, tho' a general reference in an infeftment is not good against a singular successor, yet a charter is a part of the infeftment as much as a *fasine*; and a disposition, when it is the immediate warrant of the *fasine*, stands in place of a charter, and is considered as part of the infeftment. 26th July 1737, Creditors of Smith *contra* his brothers and sisters.

A *FEU* was granted in the year 1611, with this express irritancy, *That if the feuar annulzied the land, without previously offering the same to the superior for repayment of the sum advanced for the feuright, the feu-contract should be null and extinct, and all that might follow thereupon.* This irritancy was brought into the charter as it was in the feu-contract, but omitted in the precept of *fasine*, whereby it came about, that it was not engrossed in the *fasine*, nor in any of the following infeftments, not even by way of reference; whereupon it was found, That it could not affect the singular successor of the original vassal. 6th February 1729, Gall *contra* Mitchel.

It being pleaded, That payment made by the debtor is not sufficient to extinguish an infeftment upon an apprising *contra singularem successorem*; and that intromission with the mails and duties of the lands apprised

Payment made to an adjudger, if good against a singular successor?

prised has this effect by statute only, not by common law; this was repelled. Stair, 23d July 1662, Lord Frazer *contra* Philorth.

ASSIGNATION to mails and duties, no real right. See *Competition*.

PENSION when real, when personal? See *Pension*.

FACULTY to burden, when made real? See *Faculty to burden*.

FRAUD good against the purchaser's creditors. See *Fraud*.

DISPOSITION with the burden of debts, with regard to questions betwixt the granter's creditors and acceptor. See *Passive Title*.

PAYMENT or intromission, if good against a singular successor in an infestment of annualrent? See *Annualrent*, *Infestment of*.

PERSONAL and TRANSMISSIBLE.

What rights go to heirs?

Personal
privileges.

THE Lords found, That seeing a defunct, who was heir, had been interpellated by the executors, and required, by way of instrument, to concur with them in confirming the testament; and he refusing, during his lifetime, upon pretence, That the sums in question were heritable, and so belonged to him as heir, his son could not now recur and offer collation with the executors, seeing the *jus conferendi* then offered to him, was rejected by him, and so, being extinct, did not transmit to his heir. Fountainhall, 4th January 1700, Dick *contra* his Aunts. — The Lords found, That the act of parl. 1669, requiring consignation in case of suspending ministers stipends, is *privilegium personale*, competent only to the minister himself, that he may not be drawn away and diverted from attending his charge of souls; and therefore when his executors or collectors of vacant stipends charge, they cannot crave consignation. Fountainhall, 2d June 1697, a Minister's Executors *contra* Parishoners.

Reversions.

ONE having sold lands, and taken a backbond obliging the purchaser to redispone, in case the seller should repay the price betwixt and a precise day, and the seller having died in the *interim*; the lands were found legally redeem'd upon the heir's making an offer of the price at the term mentioned in the backbond, tho' it was urged, That the backbond was personal. Stair, 9th January 1662, Earl Murray *contra* Ld. Grant.

Reduction
upon minority
and lesion.

AN heir may pursue reduction of a deed done by the minor predecessor *ex capite minoritatis & læsionis*. Durie, 7th March 1637, Vernock *contra* Hamilton. Gosford, 14th July 1669, Forbes *contra*

tra Earl Marishall. Fountainhall, 15th December 1698, Straiton *contra* Wight.

RENTALS of their own nature are not transmissible, and end by the decease of the giver, and also of the receiver, being *stricti juris*, unless the contrary be expressed. Haddington, July 1612; *contra* ^{Tacks and rentals.}

— The heir of a tacksmen was found not to have right where the tack bears not heirs or assignies. Haddington, 11th November 1609, Ld. Drum *contra* Neiven. Colvil, 23d June 1579, Little *contra* Ld. Lintoun.

A LIFERENTRIX having accepted from her son of a bond for a sum of money, payable yearly, in lieu of her liferent, and declaring she was content, her son, without mentioning his heirs, &c. should bruik the liferent during her life; and the son binding himself, and successors, &c. to pay the said annuity; the Lords found, That this was only a favour granted to her son personally, and not to his heirs; and that neither they, nor his relict, had right to bruik thereby, but that it expired by the son's death. Durie, 20th March 1633, Lyon *contra* Stewart. — A man, a little after his marriage, granting bond to his wife, payable in case the marriage dissolved by his death, within the year and day, without a living child; and he having died within the year without children, and thereafter she deceasing also within the year; the Lords sustained process at the instance of the wife's executors, tho' it was pleaded for the husband's representatives, That the provision was personal to the wife herself, and in this singular case died with her. Fountainhall, 18th January 1705, Barber *contra* Barber. ^{Donations.}

SUMMAR diligence competent to a minister for payment of his stipend, is a personal privilege, and goes not to his representatives, who must insist in an ordinary action for the annat and arrears of stipend. Durie, 17th December 1623, Relict of Minister of Livingston *contra* Parishoners. — But summar diligence, to which the debtor has consented by a clause of registration, is a privilege of the bond, and goes along with it, whether to legal or voluntary assignees. This was found in the case of a compriser. Durie, 21st March 1635, Lord Yester *contra* Ld. Innerwick. ^{Summar diligence.}

What go against Heirs ?

REVERSIONS extended against the heirs of the granter, tho' no mention be made of heirs. Durie, 6th, Auchinleck, (*Reversion*) 10th February 1630, Muir *contra* Muir. ^{Reversions.}

A BOND of pension granted to an advocate was found to die with the granter, seeing no mention was made of his heirs in the bond, and that it did not last during the receiver's life. Fountainhall, 25th January 1693, M'Kenzie *contra* Marquis of Montrose. ^{Pensions.}

THE heir of one who was successor *titulo lucrativo*, was found as universally liable for the first defunct's debts, as his immediate predecessor would have been; altho' an heir to a vitious intrometter is only ^{*Præceptio hæreditatis.*} liable

liable *in quantum lucratus*; because vitious intromission being penal, is not so rigorously extended against the intrometter's representatives, as the passive title of universal successor, which is not a vitious title, but *præceptio hæreditatis*. Marcus, (*Airs*) March 1686, Duff of Braco *contra* Innes. Bruce's MS. 24th January 1717, Henderson *contra* Wilson. Home, 22d July 1725, Schaws *contra* Heirs portioners of Glenour.

*Actiones pœ-
nales.*

ALTHO' the heir of the committer of spuilzie cannot be pursued criminally as himself might have been, yet he may be civilly conveyed for restitution, altho' none of the spuilzied goods come to his hands, nor are converted to his profit. Balfour, (*Spuilzie*) 5th, Maitland, 11th July 1552, Ld. Kinfauns *contra* Ld. Craigie. Colvil, January, 1582, Monro *contra* Wishart. --- Altho' regularly a husband's executors are liable for a debt contracted by the wife (*stante matrimonio*) with his consent, yet a woman suspected of adultery, having given bond with her husband's consent, not to keep company with a certain man; and being convicted nevertheless to have done so, and the thing proved after the husband's death; the executors were found not liable for the penalty, being for a delict. Haddington, ult. May 1610, Hog *contra* Bell. --- Representatives are not liable universally upon the defunct's vitious intromission, but only *in valorem*. Stair, 10th, Dirleton, 14th July 1666, Cranston *contra* Wilkieson. Dirleton, 14th December 1676, Wallace *contra* Murray.

*Actio ex de-
licto, rei perse-
cutoria.*

AN action *ex delicto*, tho' *rei persecutoria* only, found not to go against heirs. Forbes, 17th, Fountainhall, 19th January 1711, Lady Ormiston *contra* Hamilton.

Declarator
of recognition.

A DECLARATOR of recognition may be pursued after the vassal's death; because, tho' *delicta morte extinguuntur*, yet recognition befalls not as a *crime*, but as a *condition*, implied in the nature of the right, that if the vassal alienate, his fee becomes void. Stair, 19th February 1662, Ld. Carnegie *contra* Ld. Cranburn.

Usury.

A CREDITOR dying during the dependence of reduction upon the head of usury intended against him, it was questioned if this penal process could transmit against his representatives; the Lords found, That the effect of usury, being to annul the bond as a *real* exception, it was good against every person claiming upon the bond; and if good against the heir by way of *exception*, it must be good by way of action, being the same thing in a different form. July 1732, Creditors of Merchiston *contra* Representatives of Colonel Charteris.

Litifcontes-
tation with
the defunct.

THE heir or executor of a vitious intrometter, found liable only *in quantum* the intrometter was *lucratus* by the intromission, unless he had been pursued as vitious intrometter in his own life, which would have made his heir universally liable. Marcus, (*Airs*) 28th November 1682, Paip *contra* Ld. of Newton. --- An extracted act of litifcontestation, and a proof led of the vitious intromission against the intrometter himself, was found sufficient to make his representatives liable *in solidum*. Dalrymple, 5th June 1717, Forbes of Thornton *contra*

contra Forbes of Tolquhon. --- A party having been cited in a process of spuilzie and ejection, but dying before litiscontestation; the Lords refused to allow the pursuer his oath *in litem* against the defender's heir, a minor, who offered to make up all his real loss and damage to him. Forbes, 5th, Fountainhall, 11th July 1711, Lewars *contra* Ld. Mauldslie. --- Litiscontestation being made in a defender's lifetime, and the pursuer then insisting against the heir for proving the passive title of vitious intromission of the defunct, because *lis* was *contestata*, and being forced to amend his libel, by only changing a Christian name, which he alledged he might do till sentence; the Lords found, That having altered his summons, the interlocutor upon which the act of litiscontestation should have been extracted, did not bind the penal passive title against the defunct, so as to militate now against his heir. Forbes, 7th, Fountainhall, 8th February 1712, Stewart *contra* Earl Bute.

What Rights go to Assignies?

REVERSIONS are *stricti juris*, and go not to assignies, unless so expressed. Haddington, 20th July 1611, Cochran *contra* Gourlay. --- But where the order of redemption was used by the reverser himself, the assigney was found to have sufficient right to insist in a declarator of redemption and removing against the wadsetter. Stair, 6th December 1661, Home *contra* Home. --- The like, tho' the cedent died in the *interim* during the dependence of the declarator of redemption. Spotiswood, (*Redemption*) February, Durie, 3d March 1630, Murray *contra* Myles. Fountainhall, 2d January 1696, Burnet *contra* Burnet. --- The reversion of a wadset being conceived to the heirs and assignies of his own body, an order of redemption was not sustained, being at the instance of an assigney, who was not of the reverser's own body. Stair, 1st February 1667, Earl of Tullibairden *contra* Murray.

Reversions

TACKS are personal, and cannot be conveyed to assignies, unless expressed. Stair, 18th June 1680, Home *contra* Lyel. --- The same, tho' the tack bore a power to sublet. Stair, Gosford, 3d January 1672, Lady Binning *contra* Sinclair. --- A man who has a liferent-tack cannot dispoise the same to another, even for his own life, without consent of the master. Colvil, June 1581, Ld. Strathurd *contra* Steven. --- A tack being set to a man and his spouse during their life, and to their heir after them; and their apparent heir, posterior to their decease, having assigned the tack, the Lords found this alledgeance relevant against the assigney, That the tack was set personally to the liferenters therein named and their heir, without mentioning assignies. Durie, 14th February 1623, Rattray *contra* Graham. --- Found, That a tack set to a man during life, and to his heirs indefinitely, for two or three nineteen years, may be assigned by the principal tackfman, if assignies be not excluded *per expressum*. Spotiswood, (*Tack*) 10th February 1627, Ross *contra* Blair. --- Liferent tacks are assignable, tho' assignies be not expressed; because in these there is no *delectus personæ*, no choice of a good tenant, but a simple constitution of a right in favours of the liferenter. Durie, ult. February 1637, Home *contra* Craw. Stair, Gosford, 16th July 1672, Duff *contra* Fowler.

Tacks

— A tack being set with this clause, That it should not be assigned to any man of higher degree than the tacksmen himself; and the said tack thereafter falling with other things under the tacksmen's escheat; it was found, That the Lord of the regality, in whose hands the escheat fell, might assign the tack to a person of whatsoever degree, notwithstanding the said clause; because *hoc casu dominus utebatur jure fiscali, & licitum est fisco de rebus suis disponere, quando & cui libuerit, sine ulla personarum distinctione.* Colvil, 3d December 1578, Lord Borthwick *contra* Archbishop of St. Andrews. — A tack set for nineteen years to a man and his wife and their heirs, including assignies, may be sublet, seeing an exclusion of assignies is no exclusion of sub-tacksmen. Marcus, (*Tacks*) March 1686, Sir James Rothead *contra* Moodie.

A vassal cannot substitute another in his place.

ONE who disposed certain lands to be holden of himself by the *disponer* his heirs and assignies, was found obliged to receive and infest the assigney. Stair, 29th January 1673, Ogilvie *contra* Kinloch. — *Feuda* are *stricti juris*, and go not to assignies, unless expressed; and after infestment, tho' the disposition bear assignies, the assignation hath no effect; because, when the disposer has once granted infestment to the disponee himself, or to his assigney, he has performed his obligation, and there is no ground to oblige him to grant a second infestment. Stair, 5th February 1663, Lady Carnegie *contra* Ld. Cranburn. — The like. Fountainhall, 14th January 1696, Ld. Carnwath *contra* Creditors of Nicholson.

Clause of regrefs to ex-cambed lands.

AN excamber getting in his charter a clause of regrefs against the excambed lands in case of eviction, to him and his heirs, without mentioning assignies; the clause was nevertheless extended in favours of a singular successor in the lands. Durie, 14th July 1629, Ld. Wards *contra* Ld. Balcomie.

Alimentary provision.

A BOND for a certain sum payable yearly to a wife for her aliment granted by a third party, does not fall to the husband *jure mariti*, she not being otherwise alimented by him; neither will payment made to the husband, nor compensation upon debts due by him afford a defence against the wife. Durie, 4th July 1637, Tenant *contra* Futhie. — The like. Haddington, *penult.* November 1622, Edmondston *contra* Kirkaldie. — Nor is such a sum affectable by the husband's creditors. Durie, Spotiswood, (*Husband and Wife*) 27th March 1627, Ld. of West-Nisbet *contra* Ld. of Moriston. Bruce, 16th December 1714, Spruel *contra* Duke of Douglas.

A LIFERENT annuity granted by a first husband, found affectable by the second husband's creditors, tho' the wife and family had no other means of subsistence, in respect it was not granted in the form of an alimentary provision. Durie, 8th March 1639, Ld. Kilkadron *contra* Ld. Balgillo. — A gift being made in exchequer of *L. 130 Sterling* yearly to a man's wife and children, the same was found not attachable by the husband's creditors, tho' the gift was not qualified to be alimentary, nor to be exclusive of creditors. Here the creditors further pleaded, That the sums they had advanced were for the maintenance of the Lady and family; which was not found relevant, unless the money had been advanced after the alimentary provision took place.

place. Stair, Dirleton, Gosford, 22d December 1676, Dick *contra* Dick. — But a friend having left the liferent of a sum to a married woman, *for her better support and maintenance*, the same was found affectable by her husband's creditors, the sum not being directly constituted by way of aliment, nor the creditors expressly debarred. Fountainhall, 26th November 1697, and 12th January 1698, Creditors of Gordon of Pancaitland *contra* his Lady. — A Lady having a liferent provision from her first husband, the same was challenged in a reduction by the first husband's creditors during her second marriage; which produced an agreement in this manner, That the Lady should be restricted to 800 merks, by way of a yearly alimentary annuity, excluding her husband's *jus mariti*, and that her discharge should be sufficient without her husband. The provision thus settled was found to be alimentary, and not to be attachable for her third husband's debts. Fountainhall, 27th January 1709, Dick *contra* Dunbar.

A RELICT, by her contract of marriage, being bound to restrict her liferent in case of children, the superplus being for their aliment; this superplus being moderate, was found not affectable by the defunct husband's creditors. Stair, Gilmour, 16th November 1665, Wat *contra* Ruffel. — Otherwise, in an aliment to an apparent heir, which was considerable, and presumed done to disappoint creditors. Stair, 14th June 1677, Blackwood *contra* Boyd. — It being provided in a contract of marriage, That the wife's jointure she had by a former husband should be allowed for maintaining the family, and that it should not be lawful for either him or her to apply it to any other use; found, That this clause of appropriation did exclude the husband's creditors, since it exceeded not the bounds of a suitable aliment. Fountainhall, 3d February 1705, Dickson *contra* Braidfoot and Pitcairn her husband.

FEES to a Commissioner of parliament not arrestable, as being alimentary, and given *ad certum effectum*. Forbes, 28th March 1707, Molison supplicant. — Yea an aliment granted by the King was found not affectable by the grantee's creditors, tho' bestowed *ex pietate* only, and not for services to be done. Stair, 3d December 1674, Cockburn *contra* Lord Sinclair. — Found, That a fee, in so far as necessary for the servant's aliment, conform to his condition of service, could not be reached by his creditors, to whom he had made *cessionem bonorum*; but as to the superplus it might. Gosford, 8th, Stair, 9th July 1668, Boag *contra* Davidson.

A DEBT payable to one upon a decreet-arbitral, was found arrestable by a party who was his creditor before the decreet, tho' it was therein declared alimentary, and not affectable by creditors; because it was not in the power of a party himself by submitting, nor of the arbiters by decerning, to disappoint lawful creditors. Forbes, 22d June 1705, Irvine *contra* Crawford.

A GIFT from the crown of being King's sole Printer for the space Gift of King's of forty one years, bearing, "To heirs, assignies and substitutes," Printer. found adjudgable, tho' it was pleaded to be an office of trust, where there was a *delectus personæ*. 8th February 1737, Nairne *contra* Freebairn.

Powers and
privileges.

AN abbot having granted a feu of certain lands, reserved to himself and successors a right to win coal for their own proper use alienably: It was argued, That this could only descend to the abbot's successors in the abbacy; but it was found, That the abbot had a power to convey his right to other singular successors in particular lands. Stair, 25th November 1662, Lord Burleigh *contra* Syme. — The power given to debtors by act 62, parl. 1661, to restrict appraisers to their annual rents, is purely personal, and not extended to any coming in place of the debtor by legal diligence. Stair, 20th July 1671, Lindsay *contra* Maxwell. Stair, 28th July 1671, Murray *contra* Earl Southesk.

Privileges
of the fisk.

THE cautioner of a collector of supply having paid in for him some arrears he was resting to the fisk, and gotten assignation thereto, and thereupon craving preference to all the collector's other creditors, upon the privilege competent to the fisk; the Lords superfed to determine what preference the cefs had beyond other debts, but thought that whatever these privileges were, the assigney had them in the same manner, that the publick, his author, had, before the denuding. Fountainhall, 5th July 1705, Creditors of Cleland competing.

Landlord's
hypotheck.

IF a master assign his rent, the assigney has the same privilege of hypotheck that the master had. Gilmour, January 1665, Anderson *contra* Provan. Forbes, 23d July 1707, Wedderburn *contra* Man.

Burgesses
privilege of
summar arrest-
ment.

A BURGESS of Edinburgh may take an assignation to a debt owing to another burges, and thereupon arrest the debtor, and cause waird him till he find caution to answer as law will. Haddington, 22d January 1611, *contra*.

Lands once
united, conti-
nue so in the
assigney's per-
son.

ALTHO' a subject cannot unite lands, yet they being once united by the King, a subject may dispoise them in the same manner, as he had the same granted to himself, altho' the disposition be not confirmed by his Majesty. Durie, 12th July 1626, Stewart *contra* Earl of Home.

A charge to
enter heir, if
assignable?

A PARTY having assigned to his son a decret against a debtor, together with a charge to enter heir against the debtor's son; and the assigney insisting on the charge, the Lords found, That the charge did not expire by the death of the cedent, and that the pursuer needed not use one at his own instance, because the charge being a part of the process, the pursuer might be assigned to it as well as to a summons, or to any other letters, &c. Spotiswood, (*Heir*) Durie, 18th June 1631, Campbell *contra* Captain of Clanronald.

Warning, if
assignable?

ONE assigned to a warning made by the heretor, and also judicially assigned to a comprising led against the heretor; this sustained as a sufficient title in a removing. Haddington, 28th July 1613, Hay *contra* Bandene. — An assignation to a warning was found not a sufficient title in a removing, especially the cedent being denuded by a comprising, even tho' the comprising offered to concur, seeing he had no right to the warning. Haddington, 21st February 1623, Ker *contra* Tenants of Nisbets.

Tho'

Tho' voluntary Assignees be excluded by Law or Paction,
the Right may be affected by legal Diligence.

A REVERSION granted to any person and his heirs, including assignees, may be comprised. Hope, (*Comprising*) 3d February 1619, Bruce *contra* Bucky. — The reversion in a wadset being granted to the reverser and his heirs, but not to assignees, the Lords, in a pursuit to accout and reckon, at the instance of an assignee, found this sufficient to exclude him, so long as he insisted on his voluntary disposition; but found, That this would not defend against him, when he produced a right from comprisers of the subject, unless the reversion were so personal, as to exclude both assignees and comprisers: Fountainhall, 30th July 1680, Bruce *contra* Vassals of Lochleven.

Personal Faculties and Privileges, to affect which there is
no legal Diligence, may they be founded on directly by
Creditors?

A MAN, in his contract of marriage, during his minority, binding himself to infect the children of the marriage in his whole lands, upon which inhibition was served at their instance against him, and he, after the inhibition, granting heretable bonds to his creditors; the Lords sustained action of reduction at the instance of these creditors, founded upon their debtor's minority and lesion, and reduced the contract accordingly. Durie, 7th March 1623, Lord Bargeny *contra* his sons. — A minor suspending a decreet upon minority and lesion, and with the bill giving in a renunciation to be heir, but deceasing before discussing, the Lords sustained the reasons of a reduction repeated with the suspension, at the instance of the cautioner therein, as if the minor had been still alive, tho' the privilege was pleaded to be personal. Durie, 23d February 1628, Dunbar *contra* Leslie. Auchinleck, (*Minor*) 26th June 1628, Leslie *contra* Campbell. — If a minor once revoked *debito tempore* within the *quadriennium utile*, a singular successor in the lands may, at any time thereafter, raise a new reduction upon minority and lesion of an infeftment of annualrent granted by the minor upon these lands. Durie, 2d February 1630, Hamilton *contra* Sharp.

It is competent to the apparent heir's personal creditors to raise a reduction *ex capite lecti*, even without necessity of adjudging. Stair, 16th February 1669, Creditors of Balmerino *contra* Lady Coupar. — But after the apparent heir's death, it is not competent, unless he, or they in his right, had been infeft in the lands before his death. Stair, Gosford, 18th February 1676, Trotter *contra* M'Kello.

A LIFE RENTER being pursued by creditors on the estate, who had only infeftments of annualrents, but had not adjudged, either to find caution to uphold the houses in terms of the act 25, parl. 1491, and act 15, parl. 1535, or to cede possession to them, upon their finding caution; the Lords sustained process, tho' creditors be not express'd in the acts of parliament. Fountainhall, 6th January 1698, Hall and Anstruther *contra* Blair.

THE Lords allowed a creditor to purge the failzie incurred upon a *pactum legis commissoriae in pignoribus*, by payment of the money at the bar, as his debtor the reverser himself might have done. Durie, 19th March 1631, Scot *contra* Dickson. — The like with regard to other irritancies. Home, November 1686, Nisbet *contra* Creditors of Dryburgh. Fountainhall, 21st December 1707, Earl Southesk *contra* Arnot.

A PARTY marrying an heiress, and bringing with him a stock of money into the family, in contemplation whereof her father, in the contract, allows a faculty to his said son-in-law, to burden the estate with a certain sum, as a provision to a second wife and children; and he having accordingly exercised that faculty, which the Lords found he had sufficiently done by marrying again and begetting children; in a competition for the sum betwixt his creditors and the relict and children, the Lords found the faculty personal, and therefore preferred the children to the creditors, there being here a *jus quasitum* to the children of the second marriage. Fountainhall, 12th July 1699, Creditors of Kinfawns *contra* his relict and children.

UPON a verbal bargain about lands, the purchaser, in security of the price, deposited some bonds and bills with the seller; a creditor of the purchaser having arrested these bonds and bills in the seller's hands, and the bargain being thereafter completed in writ, it was found, That the arrestment fell, and that it did not convey the *locus pœnitentiæ* to the creditor, which was competent to his debtor the purchaser, nor was it any *medium impedimentum* to hinder completing the bargain. 21st January 1730, Sinclair *contra* Somervell.

A PERSON interdicted having disposed lands, a creditor of his having comprised the same lands, was found intitled to insist in a reduction *ex capite interdictiōis*; for tho' the apprising could not carry the personal privilege of a reduction upon the head of interdiction, it gave the pursuer an interest in the subject, and he was entitled, *qua* creditor, to use every privilege competent to his debtor that could turn to his interest. Stair, 20th February 1666, Lord Salton *contra* Lds. Park and Rothemay.

RENTAL not assignable. See Irritancy.

COMPENSATION proponable by creditors. See Compensation.

LEGAL steps inchoat, if they fall by death, or transmit to and against heirs? See Death.

PERSONAL OBJECTION.

Cannot go
against his
own assertion.

A MAN having been once pursued for his tack-duty, and, in that process deponing, That he had no tack from the pursuer; and thereafter being pursued in a removing, and there producing a tack which had years to run, he was not allowed to make use of the same, but decerned

decerned to remove. Maitland, 7th December 1563, Ld. Inner-quharratie *contra* Ogilvies.

IN a ranking, a creditor craved preference for the debt in his horning, upon which the common debtor's escheat fell. Answered, The escheat could not fall upon this horning, because the common debtor was timously relaxed, and this very creditor consented to the relaxation. Replied, The relaxation is null by act 75, parl. 1579, being executed at the cross of Edinburgh, tho' the debtor was denounced at Haddington where his lands lay; and as for the creditor's consent, it imports only a *non repugnantia*, and cannot have the effect to validate a null deed. The Lords found the creditor's consent to the relaxation relevant to exclude him *personali objectione* from quarrelling the same upon account of any nullity or informality, whatever a third party might do. Forbes, 10th February 1710, Wallace *contra* Creditors of Spot. — It was not found a personal objection against the first annualrenter craving preference, That he was cautioner for the common debtor to the other annualrenter in the original moveable bond, in corroboration of which the heretable bond was granted. Forbes, 28th June 1711, Baird *contra* Mortimer and Deuchar. — The Lords refused to allow the heir of provision of the granter of a charter, to quarrel the same for want of infeftment, in an improbation at his instance; but repelled him, even in the first instance, upon his being *subsidiarie* liable to warrant the right, without necessity to call the heir of line, *quia lites non sunt multiplicandæ*. Forbes, 31st January 1712, Earl Forfar *contra* Gilhagie. — The benefit of a possessory judgment is never granted in prejudice of him to whom the possessor disposed, or of him to whose disposition he consented, it being against *bona fides* for any one to impugn his own deed. Stair, 9th November 1665, Lady Knapeirn *contra* Farquhar.

A CAUTIONER for a curator was not allowed to plead, That the curator had no right by reason of a prior act of curatory standing unreduced, in respect neither the curator nor his cautioner could impugn their own deed, and the pursuit was for a sum intromitted with by the curator upon that title. Durie, 5th December 1627, Rollock *contra* Corbies. — A liferentrix publicly infeft, and confirmed by the superior, took a gift of her son's ward, with a view to exclude some base infefters in possession, which she could not do by virtue of her liferent-right; the vassals pleaded, That the ward did not fall, the lands being full by the pursuer's conjunct-infeftment confirmed by the superior. It was answered, That the same did not exclude the ward, not being registred. Replied, That she could not quarrel or impugn her own right, which was repelled, seeing she cled not herself with that right, but with the right of ward, and which she might as validly take as any other. Durie, 24th July 1629, Lady Cathcart *contra* Vassals. — In a declarator of liferent-escheat at the superior's instance against his vassal, a compriser from the vassal appeared for his interest, and pleaded, That there could be no liferent-escheat, in respect that the vassal's sasine was not registred, and consequently was null by act of parliament; the Lords repelled the defence, seeing the defenders could not object the nullity of their own right. Durie, 18th February 1631, Lord Cranston *contra* Scot. — The donatar to one's escheat being pursued for the debt in the horning,

ing, alledged, That the horning, denunciation, escheat and gift were null, having proceeded upon general letters, and he offered to renounce the gift; this was repelled in respect of his intromission, after which he could not quarrel the horning nor renounce the gift. Durie, 15th March 1631, Fletcher *contra* Kid. --- A bishop having set a nineteen years tack of his tithes, for a small duty, but a large grassum, after his *conge d'eslire* was come down for another bishoprick; and after his translation having charged for the grassum, it was objected, That the tack was null, as being granted after the setter ceased to be bishop of that diocese; the Lords repelled the defence, and would not allow the defenders to quarrel their own right. Falconer, 24th November 1685, Archbishop of St. Andrews *contra* Town of Glasgow. See this decision, observed a little differently by Lord Marcus, under the head (*Jus tertii.*)

Can take
no benefit by
his own fault
or neglect.

A GIFT of recognition being granted to one who had a base infeftment, the donatar's base infeftment was found to be no ground of recognition to make up the major part, because it was his own fault he did not confirm. Falconer, Home, 2d February 1683, Buchan *contra* Forbes. --- In a removing, the defender objected against the pursuer's title, which was an infeftment upon a precept of *clare constat*; the Lords sustained the answer, *sciz.* That the defender had been the pursuer's tutor, who ought to have retoured his pupil, if there was any defect in the precept of *clare constat*. Haddington, 6th March 1623, Hermieshiel *contra* Stevenson. --- A superior pursuing a declarator of nonentry against a lady liferentrix, tho' he, as a near friend, was a consenter in her contract of marriage, and at his instance execution was to pass, and therefore it seemed his duty to have seen her infeft; yet the Lords repelled the defence, and found the lands in nonentry: But this being stop'd and heard again, the Lords, upon another ground, found the decret of declarator null, *viz.* Because it being libelled, That it fell by the death of the last fiar, his heir of line was not called. Fountainhall, 15th December 1686, and 12th January 1687, Duke Hamilton *contra* Countess of Callendar. --- It being objected against a poinding of the ground, That the pursuer was not infeft; and it being answered, That the defender, who was also superior of the annualrent, had been charged to infeft the pursuer; the Lords found, That no personal objection against the defender could supply the defect of a title; that it may debar a defender from pleading his exception, but cannot found an action where there is no title. Stair, Gosford, 25th June 1668, Herriot *contra* Town of Edinburgh. The like. Durie, 20th June 1627, Ld. Touch *contra* Ld. Hardies-mill.

In what cases may one object to his own deed?

A CONTRACT of marriage being conceived in these terms, That the wife should not renounce any part of her jointure, without consent of her father, &c. in writing; and having, nevertheless, in her viduity renounced part of it in favours of her son; the Lords found, That she could not renounce *cum effectu* without her father's consent in writing. Bruce, 26th July 1715, Dallas *contra* Dallas.

Personal objection against a trustee.

HE that is interdicted pursuing action for loosing the interdiction, the Lords found, That he could not be debarred by a horning produced by his said interdictor, who, being chosen for his benefit, ought not hinder

hinder his liberty, unless he can alledge just and lawful causes. Haddington, 3d March 1607, Earl Athole *contra* Ld. Edzel.

PERSONAL PROTECTION.

A PERSON was refused to be relaxed from the horn, tho' only ^{To a witness.} *ad testimonium dicendum*, unless the party at whose instance he was denounced would consent. Colvil, 4th December 1581, Lady Athole *contra* Commendator of Couper. — The Lords refused to relax a party for a time, that he might bear witness, or otherwise stand in judgment, he being at the horn for a crime; otherwise if it had been for a civil cause. Haddington, 7th January 1593, Hering *contra* Lord Yester. — John Stewart being at the horn for civil causes, and having necessary occasion to be permitted to compear, to have curators chosen to his grandchild, the Lords gave him a protection to that effect. Haddington, 2d December 1622, *contra*. — The Lords refused to interpose in granting their letters of protection to one who was a material witness in a process of adherence before the commissaries, because they judged it not proper for them to interpose in the commissaries jurisdiction, unless it were either by advocacy or suspension. Fountainhall, 16th February 1704, Chalmers *contra* Brown.

The act 4th parl. 1663, discharging protections, and allowing the supreme courts to grant protections to persons summoned before them, ^{To a party to answer in his own cause.} was found only to take place where they are obliged to appear personally to give their oaths or to be witnesses, and cannot appear by procurators; but that such protections ought not to be granted upon pretext, that processes of compt and reckoning and others cannot be managed without their own presence. Dirleton, 8th December 1675, Ld. Wamfray supplicant. — The Lords granted suspension of all hornings against the debtor for some time, in order to give him a *personam standi* before the council, to answer upon several alledged riots. Stair, 7th December 1669, Urquhart supplicant. — The Lords of session do grant personal protections, not only when the execution is for a liquid debt, but also *ad factum prestandum*. Stair, 7th November 1678, Whitehead *contra* Johnston.

A PROTECTION granted by his Majesty to Maxwell of Hills, not found expedient to be authorised by the session, for staying the creditors ^{Personal protection granted by the King.} to whom he was adebted as cautioner for the Lord Maxwell, to poind his goods or apprise his lands. Haddington, 24th May 1610, *contra*. — Superfedere granted by the Lords, at the desire of his Majesty's letter, to the Ld. of Johnston, of all actions to be pursued against him till his age of fourteen years. Haddington, 9th November 1611, *contra*.

PERSONA STANDI.

What founds
the objection?

A HORNING not proceeding upon the Lords letters, but only upon a written command, given to the party by the King, charging him not to intromet with such and such teinds, under the pain of rebellion, whereupon he, disobeying, was denounced; the Lords refused to sustain it, to debar the party *ab agendo*. Spotiswood, (*Horning*) 1590, Ld. Wedderburn *contra* — Found, That an excommunicated person might insist in a process, seeing he was not at the horn; and in general, that excommunication could not prejudice a person of those things *quæ sunt juris naturalis, aut gentium*. Durie, 8th July 1636, Ld. Colston *contra* Lord Cranston. — Denunciation at the cross of Edinburgh, where the party dwells not, takes not away his *persona standi in judicio*. Stair, 24th January 1674, Blair *contra* Blair. — The Lords refused to sustain process at the instance of a French-merchant against a Scots-merchant, in time of war with France; and further, the Frenchman's factor here having next produced a bill of exchange, giving him right to the sum acclaimed; the Lords also repell'd this, because the summons was not pursued in his name on that proper right of his own, but only as factor for the Frenchman, nor would they suffer him to transform his summons by way of reply. Fountainhall, 15th June 1704, Arnault and Gordon his factor *contra* Boick.

To whom
competent to
plead the ob-
jection?

COMPETENT to any party in a process to make the objection, tho' neither creditor nor donatar. Durie, 8th, Spotiswood, (*Horning*) 2d March 1631, Chisholm *contra* M'Doual. — A party producing a horning to debar another *ab agendo*, tho' the horning was at a third party's instance, who declared under his hand, That he would not use the horning to debar him; yet the Lords refused to sustain process; but they were of opinion, That the creditor's declaration was a sufficient ground for obtaining relaxation, so far as to have *personam standi in hoc judicio*. Durie, Auchinleck, (*Horning*) 18th February 1630, Wright *contra* Wright. — The verity of a libel being referred to a defender's oath, the Lords found, That in such a case the pursuer could not exclude the defender from deponing by a horning, seeing he craved his oath, and warned him to compare to give it: But our author here remarks, That by this reason all pursuers may be hindered from debarring defenders by a horning, seeing they are summoned to hear decreet, or else alledge a cause, &c. Durie, 15th July 1624, Dickson *contra* Ld. Coldingknows.

Against
whom compe-
tent?

A PURSUER was debarred by a horning, altho' the writ he founded on (being a contract) bore, to be entred into for the behoof of another, who offered to insist. Haddington, 13th December 1609, Ld. Ruthvens *contra* Ker. — An assigney pursuing, and downing, that the pursuit was for the behoof of the cedent, the Lords found, That, as the horning would have debarred the cedent from pursuing, if the pursuit had been at her own instance; so it must also stop process at the assigney's instance. Spotiswood, (*Horning*) 2d, Durie, 8th March 1631, Chisholm *contra* M'Dowal. — The suspender being debarred by a horning, and his

his cautioner, and also the magistrate being pursued *actione subsidiaria*, craving to be allowed to insist; the Lords refused to hear any of them, the cautioner being irresponsal, unless caution were found by the party, or by one of those compearing, to pay the debt in case they prevailed not. Durie, 6th March 1632, Redicks *contra* Dalbatie. — A pursuer being debarred by a registred horning, and then assigning the debt, and the assigney insisting in his own name, after the subject was rendered litigious; the Lords, nevertheless, found, That the objection was personal, and could not meet the assigney, but that he might carry on the process, the assigney having declared, that whatever was competent against the cedent, whether *in causa* or *per modum probationis*, should militate against him, the assigney; and so in effect *nihil innovebatur*. Fountainhall, Forbes, 10th July 1706, Young *contra* Young.

A PERSON pursuing declarator of another's escheat, upon several hornings produced, and another, whereby he offered to debar him from defending, which last horning, tho' express'd also in the gift, yet the pursuer having declared, That he only made use of it to debar him; the Lords found, altho' the defender offered to improve this horning, That he ought to be relaxed before he could be heard to propone improbation. Durie, 14th June 1626, Ld. Foulis *contra* the donatar of his escheat. — The like. Haddington, 11th November 1609, Thomson *contra* Ramsay. Haddington, 21st December 1609, Doig *contra* Dempster. — A man being pursued to compt and reckon in general, without mentioning a special sum, and he offering to compt, which was the desire of the libel, and to pay all that could be decerned against him; the Lords, nevertheless, found, That the pursuer might debar him by a horning, and therefore decerned in general, ordaining the defender to compt conform to the libel; but declared they would pass suspension without caution, seeing, the decreet being so general, it would be hard to find cautioners. Durie, Spotiswood, (*Horning*) 13th June 1628, Rule *contra* Ld. Aiton. — An advocacy being produced for a party before the inferior court, and the other party offering to debar him from producing by a registred horning, and the judge thereupon giving sentence, without regard to the advocacy; the Lords reduced the sentence, as given *spreto mandato*. Durie, 8th March 1634, Charteris *contra* Myles. — The like. Colvil, November 1582, Home *contra* Homes.

Effect of the objection; 1mo, Debars parties from pursuing or defending.

A PERSON at the horn, not only cannot himself be party in any action, but neither can his wife, tho' she have interest in the cause, as being, *e. g.* conjunct fiar of the lands in controversy, because she must be authorised by her husband, which in this case he cannot do being at the horn. Balfour, (*Defender*) 11th February 1563, Johnston *contra* Ld. Johnston. Spotiswood, (*Horning*) 2d, Durie, 8th March 1631, Chisholm *contra* M'Dowal.

2do, Debars a husband to authorise his wife in judicio.

CIVIL rebellion debars a judge from the exercise of his office, and he may be declined upon that head. Durie, 29th January 1629, Kellie *contra* Winram.

3tio, Debars a judge from the exercise of his office.

A PARTY at the horn cannot be served heir till he be relaxed. Balfour, (*Brieves*) 1st April 1558, the King *contra* Lindsay.

4to, Debars a service.

— An heir who was to be served having petitioned the Lords before hand, to give him a *persona standi in judicio*, in case a certain other party, concerned in the service, should offer to debar him

by a horning, he always finding caution to satisfy the cause therein contained; the Lords refused the desire of this petition, as being a novelty. Auchinleck, (*Horning*) 17th July 1629, Earl Caffils suppliant. ---- Yet the Lords complied with the desire of such a petition in a case every way the same, about a year thereafter, but only *ad hunc effectum*, that the persons might stand in judgment till they were served without caution; which singular favour was granted for these reasons. 1mo, Because by their service no creditor would be prejudged, but the debtor better enabled to satisfy them. 2do, In respect the prescription was so near, and if they lost this day, they lost their action for ever. Durie, 19th, Auchinleck, (*Horning*) 22d June 1630, Earl Crawford and Ld. Cofs supplicants.

5to, Barsa
party from be-
ing chosen cu-
rator.

AT an election of curators, horning being produced against some of these chosen, the Lords found, That whatever detriment the minor might sustain by want of authorising, no man at the horn, unrelaxed, could be chosen, or suffered to compear to do any act to be expedie in judgment. Durie, Auchinleck, (*Curators*) Spotiswood, (*Tutors*) 4th July 1629, Corbet *contra* his nearest of kin.

PLANTING and ENCLOSING.

Streighting
of marches.

IN a process for streighting of marches against an heretor, whose estate was tailzied with severe, irritant and resolute clauses; the Lords decerned and adjudged, with this quality, That the land which the defender was to get in excambion, should be fettered with the same irritant clauses as the former was; and in case money were decerned, that it should be tailzied or imployed on lands in the same manner. Fountainhall, 10th January 1702, Sir John Ramsay *contra* Sir James Primrose.

March-dike.

IN a pursuit to pay the one half of the expence of a march-dike, it was objected, That the statute was not to be understood but of dry marches, whereas the marches in question are distinguished by a burn; the Lords sustained process, and ordained, if the defender pleased, that the stripe of water run a space within the dike, and a space without, that both parties might have the benefit of watering. Stair, 21st July 1669, Earl Crawford *contra* Rigg. — In a pursuit upon the act of parliament for half the expence of a march-dike, it was found, That seeing the pursuer had built the dike, without requiring his neighbour to concur, that the neighbour was only liable *in quantum lucratus*, by not being put to the expence of concurring in the building, which he might have done by his own servants. Stair, 9th January 1679, Seton *contra* Seton. — The act 41, parl. 1661, burdening the heretor of the adjacent ground with half of the expence of the march-dike, was found not to reach small feuars, who had not above five or six acres of ground. 3d July 1739, Dr. Penman *contra* Douglas and Cochran.

Turning about
the highway.

THE Lords found, King Charles II. his act of parliament to be a perpetual law, in so far as for encouragement of enclosing it impowers Justices

Justices of Peace to cast about the highways, tho' the clauses appointing heretors and liferenters to enclose and plant a certain quantity of ground, and exempting from cess, be temporary. Forbes, 28th July 1713, Dunbar *contra* Gordon. — An heretor taking benefit of the act of parliament to cast about the highway, was found bound to make up the new way all upon his own charges. July 1724, Justices of Peace of Mid-Lothian *contra* Tenants of Liberton, &c.

MR. Nafmyth having had some young trees destroyed in the neighbourhood of a village, called The water of Leith, insisted in a process against the inhabitants, founding upon an act, 1mo Georgii, intituled, *An act for encouraging of planting*, which provides, *That the inhabitants of such parish, ville, or hamlet, where trees are destroyed, shall be liable for the damages*; the Lords found it relevant to make the defenders, inhabitants of the Water of Leith, liable *in solidum*, without relief from the rest of the parish, that the pursuer's tenement lies within, or is a part of the ville, or hamlet, called The water of Leith; but found, That before execution against the persons liable, competent time ought to be allowed for the defenders to meet, and stent themselves for making up the pursuer's damages, and for proportioning relief to such as shall be obliged to pay more than their share. And if the pursuer's tenement be not comprehended in the Water of Leith, in that case also the defenders were found liable *in solidum*, but with relief against the inhabitants of the whole parish, allowing them time, before execution, to meet and proportion the said relief amongst themselves. 17th November 1719, Nafmyth *contra* the inhabitants of the Water of Leith. — In a pursuit against a tenant, upon the act of parliament 1698, intituled, *Act for preserving of planting*, it was proved, that a great number of natural growing trees in a glen, possess'd by the defender, were cut during his possession; but that the ground where the natural growing trees were, had been in use to be pastured upon by horse, nolt and sheep, as well before as since the defender's possession; and that these trees had not been preserved in time bygone to be cut for sale, and that they were not of such value as to be worthy of preserving and securing for sale: Therefore it was found, That they were not comprehended under the meaning of growing wood upon the defender's possession, which, by the said act, tenants are bound to preserve and secure, and assoilzied from the penalty of the said act of parliament. 24th July 1734, Fergusson of Auchinblain *contra* M'Nidder.

Acts of parliament for encouragement of planting.

In a pursuit against a tenant for cutting of wood within his possession, upon the act 1698, intituled, *Act for preserving of planting*, the act was found to infer a presumption, That growing timber cut or destroyed in a tenant's possession, is cut and destroyed by the tenant, unless the tenant will instruct that the same was done by a third party. 24th July 1734, Fergusson of Auchinblain *contra* M'Nidder.

When planting is cut, *cui incumbit probatio* by whom cut?

P O S S E S S I O N .

THE obtainer of a decreet of removing, is to be understood thenceforth possessor, altho' the other party do not remove, but still continues

continues in the natural possession. Balfour, (*Possession*) 7th March 1541, Lady Fastcastle *contra* Ld. Blanerne.

IMMEMORIAL possession upon a charter, tho' without a *fasine*, found relevant to continue the possession, until the pursuer produced a special right to the subject in debate. Bruce's MS. 5th July 1716, Glendinning *contra* Gordon.

POSSESSION cannot be inverted. See Mutual Contract.

MUST be restored, reserving every separate claim. Ibid.

POSSESSORY JUDGMENT.

What title
requisite?

THIS reply of nullity against the defender's infestment, *sciz.* That it was granted by a person whose right was reduced in parliament, was received summarily in a removing, notwithstanding of ten years possession. Durie, 7th December 1632, Stewart *contra* Lundie.

LANDS being disposed *cum piscationibus*, with continual possession of salmon fishing, and use of debarring others, was found sufficient to defend in a removing, being only a possessory judgment, altho' the pursuer founded upon a special right of salmon fishing, which being *inter regalia*, could not be comprehended under a general clause *cum piscationibus*. Durie, 26th March 1628, Maxwell *contra* Portrack.

AN apprising with infestment is a good title for a possessory judgment. Durie, 13th March 1637, Foord *contra* Stevenson. — But where neither infestment had pass'd, nor a charge against the superior, there was found no sufficient title. Stair, Dirleton, 6th February 1668, Johnston *contra* Erskine.

SEVEN years possession of teinds in virtue of a disposition without infestment, cannot give the benefit of a possessory judgment. Fountainhall, 16th November 1695, Baird *contra* Law.

What time
requisite?

POSSESSORY judgment not competent upon fewer than seven years possession. Stair, 13th December 1661, Hamilton *contra* Tenants of Overshiels.

What sort of
possession re-
quisite?

AFTER a decret of removing, which stated the pursuer in the civil possession, the defender continuing to possess seven years without interruption, was not found to have the benefit of a new possessory judgment. Stair, 22d July 1664, Montgomery *contra* Home. — The like, where there was a reduction of the party's right, tho' in absence, which behoved to put him *in mala fide*, so as that he could not have the benefit of a possessory judgment, by possessing *de novo*, seven years after the decret. Fountainhall, 17th January 1696, Anderson *contra* Forbes. — The contrary was found, where the interruption was by citation only, not by decret. Stair, 15th July 1668, Earl Winton *contra* Gordon. — Possessory judgment is not competent, where the entry to possession was by intrusion. Gosford, 24th Stair, 25th, June 1673

1673, Maxwell *contra* Ferguson. — The long prescription excludes all question as to the entry to possession, but the possession requisite for a possessory judgment must be lawful. Stair, 24th January 1679; Menzies *contra* Campbell. Fountainhall, 15th December 1698, Countess of Dumfermline *contra* Lord Pitmedden. — Civil possession, by obtaining two decreets for seven years rent, is not sufficient to give the benefit of a possessory judgment, which can only be effectual by the continuance of possession for seven years, either by labouring, or up-lifting the duties during that time. Stair, 25th January 1672, Harper *contra* Armor.

AN heir of tailzie not restrained from contracting debt by any irritancy, having forfeited his right to the tailzied estate after he was infest therein, by incurring an irritancy upon another account; the Lords refused to allow the person retoured and infest upon the irritancy, as heir of tailzie to a remoter predecessor, to connect his possession with that predecessor's infestment, to found a possessory judgment against a creditor of the intermediate heir, whose title was voided in manner foresaid. Forbes's MS. 8th December 1713, Earl Marchmont *contra* Home.

Connection
of possession.

IN a removing from a lake, the defender excepting upon his special infestment, with 40 years possession by all deeds of property; and the pursuer replying upon her author's elder infestment and continual possession, and also debarring all others, and particularly the defender, by breaking his boats, &c. the defender's exception was not found relevant in this possessory judgment, and the pursuer's reply was admitted to probation; altho' it was alledged, That breaking of boats, which of itself is an act unlawful, could not be looked upon as a lawful interruption. Durie, 18th July 1626, Lady Glengarnock *contra* Ld. Kilbirnie. — An inhibition of teinds found a sufficient interruption of a possessory judgment, tho' the possessor's right flowed not from the inhibitor, unless before inhibition seven years peaceable possession could be instructed, which, giving the benefit of a possessory judgment, no posterior interruption would cut it off. Stair, 11th December 1673, Home *contra* Earl of Mar. — The Lords found, That inhibition did not interrupt a possessory judgment of lands, tho' it might interrupt a possessory judgment of teinds, inhibition not being a possessory act, but a diligence, tho' it may be the ground of a petitory action or reduction, which will interrupt after citation or sentence, as the Lords see cause. Marcus, (*Removing*) January 1683; Cant *contra* Aikman.

Interruption
of possession.

LONG possession with a habile title, cannot be taken away by way of exception of nullity, but must be reduced. Colvil, 1581, Ld. Glenham *contra* Dunlop. — The Lords refused to receive a reason of reduction by way of exception, nor would they receive the summons *incidenter* against an heretable right, by virtue whereof the defender had been seven years in possession, Gilmour, 17th January 1663, Pollock *contra* Anderson. — A wadsetter who had been long out of possession, pursuing the granter's apparent heir in a declarator, concluding that his wadset was a real and preferable right on the estate, and likewise pursuing mails and duties against him as present possessor of the lands; and the defender craving the benefit of a possessory judgment.

Effect of a
June possessory
judgment.

judgment, the Lords sustained the defence *quoad* the mails and duties, but found it not good against the declarator. Fountainhall, 28th February 1700, *Ld. of Innes contra Duke of Gordon*.

Possessory
judgment, in
what subjects
does it take
place?

SEVEN years possession of a benefice, without any other title than that of minister, gives a possessory judgment to the stipend. Stair, 25th November 1665, *Peter contra Mitchelson*. — A minister of a parsonage possessing 14 Acres of land, besides his glebe, for 18 years, as holden and repute kirk-lands, was preferred *in possessorio* to one who offered to prove, that they had been formerly possess'd as part of his lands, past memory of man. Durie, 25th February 1630, *Maxwel contra Rodger*. — Ten years possession of vicarage found sufficient in a possessory action, tho' the cattle, of which the vicarage was claimed, were kept upon a common, lying locally within another parish, the minister of which claimed the said vicarage; but many others had servitude of pasturage upon the common, beside the inhabitants of the parish within which it lay. Durie, 2d February 1630, *Minister of Falkland contra Minister of Strathmiglo*.

A TACK of teinds from an abbot, there having 40 years possession ensued upon it, found sufficient to defend against a spuilzie pursued by the titular, reserving reduction as accords. Durie, 13th July 1636, *Bishop of Edinburgh contra Brown*. — A right acquired by an heretor to his teinds, will not defend him in a possessory judgment against a tacksmen in possession of the teinds, tho' the right acquired by the heretor be prior in date to the tack of the party in possession of the teinds, reserving reduction as accords upon the prior right. Durie, 28th June 1636, *Earl of Errol contra Tacksmen*. — In a question whether a tack of teinds could have the benefit of a possessory judgment, the Lords were generally clear, that such a tack could afford a possessory judgment, as well as an infeftment, it being a real right, complete *in suo genere*, only there were two late decisions alledged in the contrary, which they desired to see before they determined. Fountainhall, 2d July 1706, *Hepburn contra Robertson*.

A RENTAL hath the benefit of a possessory judgment. Spotiswood, (*Removing*) 15th March 1627, *Earl Galloway contra Telfer*. — A tack hath the benefit of a possessory judgment by seven years possession, without necessity to alledge, That the setter was infeft, where it bears *to be granted by the setter as heretable proprietor*, and the tenant is liable for no more but his tack-duty, till the tack be reduced. Stair, Dirleton, Gosford, 1st December 1676, *Home contra Scot*. Stair, 4th February 1681, *Robertson contra Arbuthnot*.

AN infeftment of annualrent has the benefit of a possessory judgment, clothed with seven years possession, and therefore an objection made by the heretor, That the annualrent-right flowed *a non habente potestatem*, was reserved until reduction. Spotiswood, (*Mails and Duties*) 19th November 1628, *Loch contra Lockie*. — The contrary found. Harcus, (*Removing*) January 1683, *Cant contra Aikman*. — Neither is the benefit of a possessory judgment competent to the proprietor against an infeftment of annualrent, in respect the right of annualrent is consistent with the right of property. Falconer, Harcus, *ibid*.

IN a process for abstracted multures, a nullity was objected to the pursuer's title, *viz.* That it was of abbay-lands annexed to the crown, and

and no dissolution made before the pursuer's infeftment: The nullity was repelled *boc ordine*, the infeftment being clothed with 15 years possession, but action reserved upon the nullity as accords. Durie, 26th July 1628, Ld. Wairds, *contra* Ld. Dunkinty. ---- In a process for abstracted multures, the Lords refused, *boc loco*, to admit this exception, *viz.* That the defender had a prior infeftment of his lands *cum molendinis*, anterior to the pursuer's right; and this because of the pursuer's alledgeance of 40 years possession of uplifting dry multures, as astricted multures to that miln; so that in this possessory judgment the exception could not be received. Durie, 28th June 1636, Maxwell *contra* Maxwell. ---- An infeftment in multures, with seven years possession, gives not the benefit of a possessory judgment, being only a servitude like an infeftment of annualrent. Fountainhall, 19th February 1695, Grant *contra* Law. ---- In a process of abstracted multures, the defender having pleaded a possessory judgment, upon a right to his lands, *cum molendinis & multuris*, in consequence of which right he had a miln upon his own ground, and did grind his corns thereat above seven years; it was answered, That thirlage is *res incorporea*, no more capable of possession than annualrents or other *debita fundi*. The Lords sustained the possessory judgment. Fountainhall, 26th January 1698, Stewart *contra* Grant.

THERE is no benefit of a possessory judgment against *debita fundi*. Against what rights does it take place? Stair, 17th December 1673, Hadden *contra* Moir. ---- A possessory judgment was found not competent to a right of property against an annualrent-right, being of another nature compatible with a right of property. Falconer, Marcus (*Removing*) 17th January 1683, Cant *contra* Aikman. Stair, 26th June 1662, Adamson *contra* Lord Balmerino. Stair, 25th November 1665, White *contra* Horn. ---- Neither has an annualrent the benefit of a possessory judgment against a prior annualrent. Stair, 9th January 1668, Lady Clarkington *contra* Ld. Clarkington. Stair, 17th July 1675, Boyd *contra* Justice. ---- An apprising has not the benefit of a possessory judgment, against another apprising led within year and day. Gosford, 15th, Stair, 17th July 1675, Boyd *contra* Justice. Fountainhall, 4th January 1695, Wallace of Inglisfoun *contra* Campbell of Cefnock.

POSSESSORY judgment runs not *contra non valentem agere*. Stair, 13th February 1669, M'Clellan *contra* Lady Kirkcudbright. Stair, 22d July 1675, Menzies *contra* Campbell. *Runs not contra non valentes agere.*

POSSESSORY judgment is not competent against a purchaser, who, after eviction of the principal lands, recurs to the warrandice lands, unless the possession had been seven years after the eviction. Stair, 20th February 1668, Forbes *contra* Innes. *If competent against an action of warrandice?*

POSSESSORY judgment runs against minors; for minority is only excepted in the long prescription, extinguishing the right; but in the possessory judgment, which is only in relation to the method of process, and to the *fructus consumptos medio tempore*, as in all the short prescriptions, *tempus continuum*, and not *tempus utile*, is respected. Stair, Gosford, 15th July 1668, Earl Winton *contra* Gordon. *Runs against minors.*

P O I N D I N G.

Warrant of poinding. **P**OINDING for a fine upon a delict tried by an assise, sustained upon a baron bailie's decreet, tho' it wanted a precept of poinding. Durie, 24th November 1629; Downie *contra* Brown.

In what case must there be a preceeding charge? **P**OINDING for a fine upon a delict tried by an assise, sustained, tho' summarily executed without any previous charge. Durie, 24th November 1629, Downie *contra* Brown. — By act 4, parl. 1669, poinding for civil debts cannot proceed without a preceeding charge. Stair, 30th June 1675, Lady Stanehill *contra* Burd.

What subjects poindable? **G**ROWING corns found poindable, tho' they were alledged to be *pars soli*, and not poindable. Fountainhall, 15th June 1709, Ballantine *contra* Watsons. 6th July 1727, Niven *contra* Grieve.

Solemnities of poinding. **M**ETHOD of poinding stacks of corn. Stair, 24th November 1677, Lord Hatton supplicant. — An execution of poinding was found null, bearing only, *Poinding at the cross by a rip or parcel of corns, and pricking the bolls with the fodder*; but not bearing, that the messenger chused a skilful caster for proofing the corns upon oath, and that either party was allowed to see the proof casten and measured. Stair, 13th December 1679, Hay *contra* Hay. — It being objected against the poinding of a brewer's copper, That it was not carried to the mercat-cross and appretiated there, tho' a symbole and part of it was so carried, *viz.* a piece of its ledges; the Lords found the poinding lawful. Fountainhall, 15th February 1698, Smeton *contra* Brand. — The Lords found, the taking of corns poinded from tenants without a sworn metster or caster, to be legal, the corns having been measured and delivered by the tenants themselves. Forbes, 11th March 1707, Erskine *contra* Boswell.

An execution of poinding must be given to the debtor. **T**HE Lords found a poinding warrantable, tho' the messenger refused to give the debtor an execution of poinding before the poinding was completed. Forbes, 11th March 1707, Erskine *contra* Boswell.

Execution must be special as to the quantities. **T**HIS reply to an exception of lawfully poinded being proponed, *viz.* That the execution of the poinding was only in general terms, to wit, *the whole corns, cattle, &c.* without condescending upon the number and quantities; the Lords allowed the defender to adduce the sworn comprisers and taskers, who threshed out the corns and comprised the goods, to prove the quantities of the corns and number of the goods; and in case he did not prove the same, allowed the pursuer his oath *in litem*, to prove the quantities and prices of the corns, and number of the goods. Home, February 1684, M'Kean *contra* M'Dowall.

Offer of the debt stops poinding. **T**HE exception of lawfully poinded was found elidable, by an offer of the sums poinded for, to the messenger before the poinding, and consignation thereof upon his refusal. Nicolson, (*Spuilzie*) 12th December 1620, Herdman *contra* Welwood.

A THIRD

A THIRD party appearing at a poinding, with a disposition to the goods in his hand, and offering to depone on the verity of his disposition; which the messenger refused to accept, because, he having required him also to depone, whether the said disposition was for onerous causes, being from a father to the son, or if it was simulate only to prevent poindings; he refused to make faith, alledging, that the messenger had no power to put such interrogatories to parties, but that it must be tried in a declarator or reduction. The Lords, in a process of spuilzie on this head, found, That the messenger's refusing to take the son's oath on the disposition was a spuilzie. But here the author adds, That it were fit the Lords, for clearing the lieges, would determine the point, How far the extent of a messenger's power may reach, in trying the simulation of all such dispositions produced before them; else all poindings on the production thereof may be stopped. Fountainhall, 23d July 1687, Earl of Breadalbin *contra* Sinclair, &c.

Poinding stop'd upon a simulate disposition.

A THIRD party compearing at a poinding, and offering to make faith that the goods were his, the Lords found, That the rejecting of this offer inferred a spuilzie, unless the pointer would offer to prove, that the goods belonged to the debtor. Sinclair, 23d July 1543, Ld. Wedderburn *contra* Hay. — It was objected against a poinding, That the pursuer appeared about an hour after the poinding, and offered to depone, that the goods were his, and not the debtor's; it was found, That after the poinding was ended, the messenger, or party pointer, was not obliged to admit the oath of any person; and therefore refused to cause the goods to be summarily restored, but left the party to his ordinary course of proving his property in the goods poinded. Stair, Gosford, 9th July 1675, Coats *contra* Harper. Maitland, 14th July 1564, Hamiltons *contra* Sheriff-depute of Perthshire.

Poinding stop'd upon a third party's appearing, and making faith that the goods are his.

AN offer to prove, against the pursuit of deforcement, that the goods pertained to another, without that person's offer to make faith at the time of the poinding, was not sustained as relevant to purge the deforcement. Durie, 1st February 1628, Ld. Halkerton *contra* Kadie. — The like found, touching another such exception, *viz.* That the master or his servants had stopped the poinding of the tenant's corns for the tenant's own debts, in regard the master's farm was resting, the same not having been proponed at the poinding; which if it had, the pointer might perhaps have offered security to the master for his farm. Durie, *ibid.*

Poinding stop'd upon other pretexts.

A TACKSMAN of teinds cannot be poinded for the titular's debt, notwithstanding the act of parliament, allowing tenants to be poinded for one year's mail. Maitland, 14th January 1556, *contra* Ld. Gladstones's brother. — Otherwise, where the tenant is in arrear. Maitland, 8th February 1569, Spence *contra* Ld. Anstruther.

Poinding of tenant's goods for their master's debt.

A REPLY, bearing, That the goods alledged lawfully poinded were plough-goods, and that there were others of the pursuer's goods upon the ground, *viz.* horses, sheep and corns, equivalent to the sum, was time. Vol. II. A a found

Poinding of plough-goods in labouring time.

found relevant against an exception of lawfully poinded. Nicolson, (*Spuilzie*) 25th March 1624, Hepburn *contra* Layning. — Poinding of a work-horse the time of labouring, there being sufficiency of other poindable effects, is a *spuilzie*; nor is it necessary to say, that the other goods were shown to the messenger. Durie, 1st December 1630, Gibson *contra* Ld. Corbie. — The Lords sustained a poinding of plough-goods, unless the party, whose goods they were, would offer to prove, that, by and attour the plough-goods, there was as much corn and other goods upon the ground the time of the poinding, as would have satisfied both the master's rent and the debt for which the goods were poinded. Home, March 1684, Goodfire *contra* Weemyfs. — It was found lawful to poind plough-goods in labouring time, where no other moveables could be found; tho' by the act 98, parl. 1503, the poinding of plough-goods is discharged, if there are either moveables or lands to be apprised. Which act was found to be in defuetude. Fountainhall, 7th December 1692, Turner *contra* Scot. — In a process of *spuilzie* for poinding plough-goods, it was debated, Whether it was incumbent upon the debtor to offer other goods to be poinded, in order to save his plough-goods, or if it is incumbent upon the messenger first to make a search for other goods; and the Lords ordained the execution of poinding to be produced, to see whether a search had been made; but they seemed all clear, that *esto* there were other moveables, and no search for them, yet the poinding of plough-goods, in labouring time, would not infer a *spuilzie*, but only simple restitution. Fountainhall, 20th July 1703, Lawson *contra* Brown.

A *SPUILZIE* for poinding plough-goods in labouring time, was elided, by proving, that there was sufficiency of labouring goods left, and that the ploughs were left going. Falconer, 21st November 1682, Straiton *contra* Preston.

THE law anent poinding in labouring time was extended to all labouring goods belonging to the party, altho' not actually yoked at the time of poinding. Balfour, (*Poinding*) 12th February 1560, Crichton *contra* Fentons. Durie, 1st December 1630, Gibson *contra* Ld. Corbie.

Goods were found lawfully poinded, being upon the 24th October, altho' it was proved, That they had been yoked the day before, and this in respect of the time of the year in that part of the country, *viz.* the brae of Murray, where it is not the ordinary time of labouring. Auchinleck, (*Poinding*) 15th November 1617, *contra* Duncan. Durie, 15th November 1627, Gullan *contra* Dunmuir. — Poinding of plough-goods was sustained, tho' they had been that day in the plough, in respect that very day the labouring was finished for that season, nor was it respected that the party might have faughing to till thereafter. Durie, Auchinleck, (*Poinding*) Spotiswood, (*Spuilzie*) 22d November 1628, Watson *contra* Reid. — In a process of *spuilzie* for poinding labouring goods, in labouring time, the Lords repelled these two defences, *viz.* 1mo, That the labouring in that place never began till January, whereas the poinding was in December. 2do, That there was then great frost, and so no labouring. Fountainhall, Stair, 7th June 1678, Wood *contra* Stewart. — The exception of lawfully poinded in a *spuilzie*, being offered to be taken off by an alledgeance, That labouring goods were poinded in labouring time, and it being proved, That the usual time of labouring about Aberdeen was after Michaelmas,

Michaelmas, and the poining was executed upon the 28th, when some of the neighbours had striken plough, but the pursuer had not begun to till; the Lords found, That the poining was not in labouring time, tho' some of the country had begun to till. Marcus, (*Spuilzie*) March 1683, Irvine of Hilton *contra* the factor of the college of Aberdeen. --- Labouring goods being pointed on the 15th of June, when all the labouring of the neighbourhood was closed a fortnight before; the Lords thought, That the tilling up of fallow, not to be sown; but to ly that year, did not give the privilege; but, in the present case, found, That seeing the pursuer of the spuilzie had not ended his labouring that year, it was a spuilzie, tho' he was somewhat later than his neighbours about him; especially, considering it was proved there were stacks in the yard and corn in the barn, which, if pointed, might have satisfied the debt, without pointing the labouring goods. Fountainhall, 21st February, Forbes, 20th June 1712, Arnot *contra* Greigs.

THE law anent poining in labouring time, extended to horses going from a man's house to his coal-heugh to carry home coals. Balfour, (*Poining*) 24th January 1558, Turner *contra* Blackader.

THE buket, or ward of a faltan, cannot be pointed, if there are any other pointable goods. Balfour, (*Poining*) 12th and 13th January 1555, Sibbald *contra* Lord Sinclair.

NOTWITHSTANDING of a poining and the prices therein contained, the Lords found the offer of a greater price, made upon the ground to the party pointer, tho' before the act of comprising, relevant against the pointer, to make him compt accordingly; and the same found probable by the oath of the party pointer. Durie, Auchinleck, (*Poining*) 23d February 1628, Ld. Gage *contra* Guthry.

Pointer liable only to compt for the sum at which the goods are comprised, unless more was offered.

WHERE two persons point symbolically by rips of corn, found, That the poining first consummated by casting, threshing, and measuring, is preferable, tho' the other was first inchoated. Marcus, (*Poining*) November 1684, Hays *contra* Strachan. --- The contrary found. June 1727, M'Whirter *contra* Hamilton. The like. Fountainhall, 22d December 1698, Cathcart *contra* Paton.

Competition betwixt pointers.

A MAN having pointed cattle, and employed them in his own use and work, and not put them in a point-fold, or some house, where they might have fodder and water, was found liable in a spuilzie. Gosford, 13th February 1676, Kid *contra* Duncan.

Poining *brevi manu*.

POINDING must be gone about with up-sun. See Execution.

WHO unwarrantably stops a poining, whether liable for the debt, or only in valorem? See Reparation.

POINDING the GROUND.

LANDS being wadset, and the wadsetter granting backtack to the reverfer, and having raised summons for the backtack-duty, concluding also poining of the ground for the time to come; the

Proprietar cannot point his own ground.

A a 2

Lords

Lords refused to sustain this conclusion, because the pursuer, being infest in the property, he could not crave his own ground to be poinded for any thing due to him out of the lands. Durie, Spotiswood, (*Poinding*) 26th February 1632, Ld. Garthland *contra* Lord Jedburgh.

Decreet of poinding the ground, real against the ground itself.

A DECREET of poinding the ground is real, and serves so long as that person lives, at whose instance sentence was obtained, altho' the heretor should die, or the property be transferred. Durie, Hope, (*Poinding*) ult. June 1624, Keir *contra* Hepburn. — A decreet of poinding the ground is chiefly directed against the ground itself, and consequentially only against the possessors; and therefore may be put to execution against the same, in whose ever hands it be, without necessity of taking a new decreet against the present possessors, that the moveable goods therein, or the ground-right thereof, may be apprised. Durie, 21st November 1628, Watson *contra* Reid. Stair, 26th June 1662, Adamson *contra* Lord Balmerino.

How far extended against tenants?

THE act 36, parl. 1469, relates only to poinding upon moveable debts, and not to poinding of the ground, which the Lords found did affect the ground, and all the goods thereon, until all bygones owing to the poinder be satisfied, and that without regard whether the tenant be in arrear to his master, yea or not. Durie, 11th July 1628, Lady Ednam *contra* the heir. — In a process of poinding the ground, the pursuer is not put to prove the rents, but the decerniture goes in general, only *in executione*, he must take care to poind for no more than bygones and the current term. Stair, 4th February 1674, Lady Pitfoddels *contra* Tenants of Pitfoddels. See Gosford, 14th July 1676, Ld. Pouriefotheringham *contra* Lord Balmerino, which points, as if the poinding of the ground could only proceed for bygones, and that a tenant cannot be distressed for more than he is *de facto* due to his master at the time of the poinding.

A TENANT within burgh cannot be further distressed upon a poinding the ground than a tenant of land. Stair, 6th February 1679, Collet *contra* Master of Balmerino.

If *inveſta* & *illata* can be poinded?

THE Lords found that an annualrenter cannot poind corns comprised by another party for debt, and therefore sustained the summons for wrongous intromission. Hope, (*Poinding of the ground*) 28th June 1622, *contra* . And yet he remarks the Lords had formerly found in a case, Paterson *contra* Adamson, That the annualrenter might poind whatsoever goods were found on the lands, altho' the same belonged to strangers, and not to the heretor and tenants. — And so found afterwards, and that *inveſta* & *illata* belonging to strangers, might be poinded. Durie, 11th July 1628, Lady Ednam *contra* the heir. — But according to our present practice, nothing can be poinded but the proper goods of the tenant. Stair, 6th February 1679, Collet *contra* Master of Balmerino.

DECREET of poinding the ground for terms to come. See *Legal Diligence*.

P R E S C R I P T

P R E S C R I P T I O N .

Negative Prescription of forty Years.

AN heretor having obtained a decret of sale of his teinds, decern-
ing the titular to denude upon payment of the price, and im-
powering the heretor to intromet with his own teinds, until he should
get an heretable right, paying in the *interim* the annualrent of the
price to the titular; and the heretor accordingly having continued in
possession of his own teinds above forty years, in a process at the instance
of the titular for bygone teind-duties, the said decret being opposed,
the same was found not prescribed *non utendo*, in respect the heretor
had taken the benefit of the decret, and followed out the same by
intrometting with the teinds in question. Forbes, 7th June 1710, La-
dy Cardross *contra* Graham of Buchlaivie.

Founded in
disuse and de-
reliction.

In a ranking and sale of the lands of Pitcalzean, the subject in com-
petition was an apprising of these lands, led by Campbell of Boghole
1675, of which there were two conveyances, one voluntary from
Boghole to Auchlossin, 1680, the other by an adjudication at the in-
stance of Campbell of Calder, against the heir of Boghole, 1700. The
voluntary right being evidently preferable, it was objected by the le-
gal disponse, who had done diligence upon Boghole's apprising, where-
by it was saved from the negative prescription, That his competitor's
right was fallen *non utendo*, no document having been taken upon it
since it was granted. It was answered, This objection is compe-
tent to any real creditor upon the estate of Pitcalzean, whose interest
it would be to have Boghole's apprising cut down, but not competent
to any one claiming under Boghole's apprising: For if the apprising be
extinguished, there is an end of the question as to both; if it subsist,
it must subsist in his person who has the only right to the same. Re-
plied, Prescription is no other than a personal exception; it is not a re-
al extinction, like payment, to cut down the debt; and therefore, tho'
the voluntary assigney be excluded, because of his negligence, the ap-
prising may well subsist to be taken up by any person who can con-
nect a title to it. The Lords found the conveyance of the apprising
by Boghole to Auchlossin prescribed *non utendo*. 26th November
1728, Fraser *contra* M'Kenzie.—An obligation in a contract of mar-
riage to pay a certain sum not insisted on within forty years, found pre-
scribed, tho' the contract itself was saved from prescription by the di-
ligence of other parties who had an interest therein. Durie, 27th No-
vember 1630, Ld. Lauder *contra* Colmslie.—A bond being alledged
to be prescribed, and the pursuer alledging, That the prescription did
not take away the debt, but that he might still prove it to be resting
owing by the defender's oath; the Lords found, That after forty years
prescription, the defender was not obliged to give his oath whether it
was yet resting owing; and tho' he should confess it, yet that he was not
in foro humano liable for the debt, whatever he might be *in foro poli &*
conscientie. Fountainhall, 7th December 1703, Napier *contra*
Campbell.

Nature and
effect thereof.

Act 1469. FOUND, That before the act 1617, heretable titles could not prescribe, notwithstanding the act 28, parl. 1469, which mentions all obligations. Colvil, February 1588, Lord Cathcart *contra* Ld. of Gadzat.

MUTUAL contracts suffer the negative prescription, as well as simple obligations. Durie, 27th November 1630, Lauder *contra* Comilie. N. B. This was once otherwise found. Durie, 26th February 1622, Hamilton *contra* Lord Sinclair. — A contract of marriage, notwithstanding that marriage follows, may prescribe as well as any other obligation. Durie, 23d December 1630, Ogilvie *contra* Lord Ogilvie. — The act was also extended to testaments. Durie, 19th June 1627, Lindsays *contra* Ld. Balgony. — As likewise to pursuits for tutor accmpts. Hope, (*Prescription*) 17th March 1618, *contra* — And decreets, tho' *in foro contradictorio*; and this ordained to stand as a constant pratique. Durie, 26th July 1637, Ld. of Lawers *contra* Dunbars.

THE heir's privilege of challenging his predecessor's death-bed deeds suffers the negative prescription. Forbes, 18th March 1707, Murray *contra* Irvine.

Rights of
property suf-
fer not the ne-
gative pre-
scription.

IN a declarator of the property of lands, the defenders, who had been above forty years in possession, without offering to produce any title, objected to the pursuers the negative prescription. The answer was, That where a complete right of property is once established, such right must for ever remain, unless where transmitted by conveyances legal or conventional, or unless where acquired by a third party, in virtue of the act 1617, by the positive prescription, which holds *a fortiori* in this case, the defenders having produced no sort of title. The Lords repelled the alledgeance of negative prescription, in respect of the answers, that the defenders had produced no title, 24th December 1728, Presbytery of Perth *contra* the Magistrates of Perth. — But this does not hold in a liferent-right of property, which being of the nature of a burden upon the fee, may be sopite or extinguish'd; and therefore a liferentrix by locality, having taken no document upon her right for the space of forty years, her right of liferent and her claim thereupon were found prescribed. Forbes, 6th July 1711, Stewart *contra* Children of Cumming of Pittullie.

*Res mera
facultatis.*

IN a declarator of non-entry, the superior, for his title, produced a charter under the great seal, dated 1648, with a precept forth of the chancery the same year, but without any infeftment till the year 1714, that the pursuer established a right to the said precept by a general service, and thereupon infeft himself by virtue of the act of parliament 1693, giving force to precepts of sasine after the granter's and receiver's death. It was objected against this title, That the precept was fallen *non utendo* by the forty years prescription. Answered, That it being *meræ facultatis* for the obtainer of a precept to take infeftment thereon or not, precepts cannot prescribe, which was sustained. 4th July 1716, Johnston of Corhead *contra* Johnston of Newton.

A *DONATIO inter virum & uxorem* may be revoked at any time, and suffers not the negative prescription. Fountainhall, 15th January 1697, Turnbull *contra* Husband.

To

To free one and his lands from the jurisdiction of a regality, it was found sufficient that he had been free for the space of forty years, never having been enrolled or cited before the bailie, but still by the sheriff. Stair, 23d November 1671, Rolland *contra* Ld. Cragievar: ----- The Lords over-ruled the plea, That the exercise of the power of repledging, was *meræ facultatis*; and found that the negative prescription *non utendo* took place. Fountainhall, 29th January 1712, Justices of Peace of the shire of Air, *contra* Town of Irvine. ----- A right of constabulary which had been long in desuetude, and not exercised by any one act of jurisdiction for many more than forty years; was found to fall by the negative prescription, and that it was not *res meræ facultatis*. 7th December 1731, Lord Dun *contra* Town of Montrose.

POWER being given to a party, whose lands were thirled, to build a miln on his own ground; it was found, That tho' he had not built any for upwards of 100 years, yet that being *res meræ facultatis*, it could not prescribe. Fountainhall, Forbes, 14th March 1707, Ld. Bimmerfide *contra* Newmains.

IN an action of compt and reckoning, the defender proponed payment upon two receipts, in which the pursuer acknowledged the receipt of money from the defender, and obliged himself to allow the same at compting. Replied for the pursuer, The receipts are prescribed. It was answered, That discharges or receipts affording ground of defence only, and which the receiver cannot found upon till he be pursued, are *perpetua ad excipiendum*, and cannot prescribe, which was found relevant. Forbes, 24th June, 1712, Sinclair *contra* Murray.

Discharges;

IN a pursuit upon a bond saved from the negative prescription by interruptions, this defence was laid, That the bond was fraudulently elicited by an interdictor from the person interdicted, without any onerous cause. It was answered, That any challenge of fraud, formerly competent, is now cut off by prescription. Replied, The *exceptio doli* never prescribes. *Temporanea ad agendum sunt perpetua ad excipiendum*. The prescription was found to take place. 17th July 1733, Anna Home *contra* Ker of Moriston, and Home of Coldinghamlaw.

Temporanea ad agendum sunt perpetua ad excipiendum; if this holds with us?

IN a reduction of an adjudication, upon which possession had been obtained and continued above forty years, tho' not without interruption, upon this ground, That tho' it was a total adjudication, a fifth part more was adjudged for, which is only competent in special adjudications. The negative prescription being objected, it was answered, There is a difference betwixt intrinsic nullities and objections that are extrinsic resolving into grounds of reduction. These suppose the diligence to be valid in itself and effectual, till it be taken out of the way by a sentence, reducing and annulling the same; in which case the objection must be made within forty years, otherwise the right of challenge is cut off by prescription. Those go upon the supposition, that the diligence is null and void, and a reduction upon that ground does not annul, but declares that it was null and void from the beginning; and a matter of fact may be declared at any distance of time. The Lords repelled the negative prescription. 25th July 1738, Ainslie *contra* Watson.

Intrinsic objections never prescribe, whether proponed in the way of action or exception.

Negative pre-
scription of ser-
vitudes.

A PROPRIETAR of two adjacent tenements, sold the one, granting the purchaser a servitude of pasturage upon the other tenement; having thereafter feued out that other tenement, the said servitude of pasturage was mentioned in the disposition, and excepted out of the warrandice: By which it came, that this servitude was ingrossed in the rights of both dominant and servient tenements. The proprietor of the dominant tenement having neglected to use this servitude for forty years, the question occurred, If it fell by the negative prescription. That it could not fall, was argued from this consideration, That in feuing out the second tenement, it behoved to be the same, whether the superior reserved the pasturage in favours of himself, or of the purchaser of the first tenement; that in the one case it is a branch of the superiority, and can no more suffer the negative prescription than the right of superiority itself; that in the other, it is a branch of the purchaser's property, which must preserve it equally from the negative prescription. *2do*, The servitude being established in the right the vassal has to his lands, he can prescribe no right or immunity contrary to the tenor thereof. Answered to the *1st*, There is a wide difference betwixt the cases; a right to pasturage, reserved by a superior, is considered in law as a reservation of the property *pro tanto*, which therefore cannot be discharged nor fall *non utendo*; but where the servitude is reserved in favours of a third party, as in the present case, it becomes indeed an accessory of his property, but by no means a part or branch of it. 'Tis an accession the property once subsisted without, and may so subsist again; thereby it is, that a real servitude may be discharged, and of course may fall by the negative prescription. To the *2d* answered, The reservation of a right in an investment will support the right against the positive prescription, because no man can acquire by prescription more than his title carries him to; but it will not save from the negative prescription, which is founded upon the negligence of the person to whom the reserved right belongs. The Lords sustained the defence of prescription, 7th February 1735, Graham of Douglaston *contra* Douglas of Barloch.

Of annual
prestations.

IN a pursuit upon a bond of pension granted to an advocate, where the bond had lien over above forty years without any thing done upon it, yet the bygone pensions falling due within the years of prescription, were decerned to be paid to the creditor's representative; upon this footing, that every year's pension was a separate obligation, and run a different course of prescription. July 1730, Lockhart *contra* Duke Gordon.

Feu and
Tack-duties.

A FEU-DUTY being pursued for, after forty years, the Lords found, That this being a debt owing by the defender's own charter, he could not propone prescription against the same; but their Lordships thought it expedient that the pursuer should restrict his libel to so many years past, as might be within the forty last years. Durie, 15th December 1638, Ld. Garntully *contra* Commissary of St. Andrews. — The like as to tack-duties. Durie, 10th March 1627, betwixt two Glasgowmen. Spotiswood, (*Prescription*) 10th March 1627, Stewart *contra* Fleming's heir.

TEINDS

TEINDS suffer not the negative prescription. Stair, 7th February 1666, Earl Panmuir *contra* Parishioners. Stair, 16th June 1681, Fri-
erland *contra* Ld. of Orbiston. Parsonage
teind.

THE Lords found, That vicarage of lint, hemp, milk, &c. does to-
tally prescribe *non utendo* for forty years, which they also found with
respect to all species, except calves, lambs and wooll, which com-
monly pay vicarage in all places. And as to these they found, That
cessation of payment liberated only for all years above forty. Foun-
tainhall, 24th July 1678, Ld. of Grant *contra* M'Intosh. — The
like. Newbyth, 14th June 1666, Bennet *contra* tenants of Craig-
forth. — Vicarage-teind is local and consuetudinary, and some here-
tors were freed from the vicarage of geese, grice, lint and hay, which
they had not paid for the space of forty years, tho' it was alledged by
the pursuer, That he and his predecessors had been in use of all the
vicarage libelled from some of the parishioners; and this being a bene-
fice, interruption of a part preserved the whole. Stair, Gosford, Dirle-
ton, 28th November 1676, Shiel *contra* Parishioners of Prestonhall.
Stair, 7th July 1677, Parson of Prestonhaugh *contra* Parishioners.
— It was found relevant in a process for the teind of fish, that
the defenders had been in immemorial possession in the place in que-
stion, of cod and ling, free from paying any teind. Stair, 24th No-
vember 1665, Bishop of the isles *contra* Fishers of Greenock. Vicarage.

IN an action for abstracted multures, founded on a thirlage, consti-
tuted by the pursuer's charter, the defender having alledged prescription
of freedom from the mill, and the pursuer replied on interruption; it
appeared, probation being led, That the defender, for the space of
forty years and upwards, had gone very frequently, without being
quarrelled by the pursuer, to any mill he pleased, and sometimes, but
seldom, to that to which he was thirled; the Lords found prescription
of freedom proved for the defender. Marcus, (*Multures*) 4th March
1685, Tarlappie *contra* Pittendrich. — But in the like case, the de-
fenders, having been in use, continually since the date of the astring-
tion till within three or four years before the pursuit, of coming and grind-
ing corns at the mill, the astringtion was not found to be lost *non utendo*,
tho' the defenders offered to prove, That yearly, since the astringtion,
they did grind at other mills more frequently than at the pursuer's
mill. Durie, 20th December 1632, Hamilton *contra* Hamilton. —
In a declarator of immunity of bear, sold and not ground, from a thir-
lage of *grana crescentia omnium terrarum*; alledged for the defender,
That the pursuer must prove *positive*, that for the space of forty years,
regularly and openly, the bear was sold without any multure exacted,
and not barely *negative*, that the multure of any bear sold was not ex-
acted, seeing the thirlage was constituted *scripto*, altho' such a negative
probation would be sufficient to hinder, or take off, a constitution of thir-
lage by prescription. The Lords, in respect the probation, as to the
immunity, was only negative, they assolized from the declarator.
Marcus, (*Multures*) 13th June 1688, Feuars of Gaitmilk *contra* Feu-
ars of Dunfermline. — A superior, whose vassals in their charters were
thirled to his mill by a thirlage of *omnia grana crescentia*, having in-
sisted in a process of abstracted multures; the vassals pleaded as to their
bear, that they had prescribed an immunity from the thirlage, having
brought Thirlage.

brought no corns of that kind to the superior's mill, nor paid any sort of duty therefore, for the space of forty years. It was answered, That the astringency being established in the defender's charters, they could perceive no right or immunity contrary to the tenor thereof; which was sustained. 25th July 1727, Mr. John M'Leod *contra* his vassals of Muiravenfide.

Cefs.

A BURGH of regality, that had been in immemorial custom of paying their cefs out of the common good, without burdening their vassals; but now being in a decaying condition, and prevailing with the commissioners of supply to make a cast and subdivision on the feuars; in a declarator of exemption at the instance of the said feuars, the Lords found the towns vassals liable to relieve them of part of the cefs in time coming. Forbes, 20th, Fountainhall, 21st July 1710, Town of Paisly *contra* Vassals.

Positive Prescription of Forty Years.

Act 1594,
C. 218.

FOUND, That an instrument of sasine granted upon a precept, which precept was improven, was reducible, notwithstanding the infestment was clothed with forty years possession; and the Lords found, That the precept ought to be produced, and that the act of parliament 1594, cap. 218, anent the production of procuratories and precepts, could not be extended to this case. Hope, (*Sasine*) 13th February 1615, Ld. Drumlanrig *contra* Weemyfs. — By analogy of this statute, a decret at an assignee's instance, with a comprising and infestment following upon it, being sought to be reduced for want of the assignation; the Lords, in respect that the appriiser had been in possession for forty eight years, without interruption, found no necessity to produce the assignation. Durie, 4th February 1630, Earl Kinghorn *contra* Strang.

What Subjects may be carried by the positive Prescription?

King's property.

IT was found, That a servitude, even upon the King's property, or even the property itself may be acquired by prescription, it not being annexed property. Fountainhall, Marcus, (*Servitudes*) 19th February 1686, King's Advocate *contra* Lord Livingston and others. — The teinds of a certain parish being annexed to the chappel-royal, and yet, thereafter, possessed for the space of forty years by the ministers of that parish, the possession, tho' join'd with the title, *quod decimæ debentur parochæ*, not found relevant to take the teinds from the chappel-royal, in respect of the act of parliament, providing, That the King's interest shall not be prejudged by the neglect of his officers. Stair, 1st February 1671, Fergusson *contra* Parishoners of Kingarth.

Privileges
of a Lord of
regality.

THE town of Hamilton was erected in a royal-burgh, by a charter from Queen Mary, 1548, giving them power to chuse their own magistrates, &c. this charter, as it would seem, having been neglected, the town afterwards, in the year 1670, accepted of a charter from the family of Hamilton, erecting it into a burgh of regality, with a power to the Duke of Hamilton to create magistrates, admit burgeses, &c. as in other such burghs; in consequence of this charter, the family of
Hamilton

Hamilton continued to exercise the privileges and powers of Lords of regality upwards of forty years, till a declarator of their privileges, as a royal burgh, was raised, and insisted in by the town ; and they pleaded, That the privileges of a royal burgh, as being *juris publici*, can neither be lost by the negative or positive prescription ; the Lords sustained the prescription in favours of the Duke, as to the way and manner of the election of the magistrates and town council of the burgh. 4th February 1726, Magistrates of Hamilton *contra* Duke of Hamilton.

TEINDS belonging to a parsonage, and consequently *extra commercium* before the act 1693, whether such could be carried by positive prescription, debated, but not finally determined. December 1729, Nicolson of Glenbervie *contra* Viscount of Arbutnot.

Teinds belonging to a parsonage.

What Title requisite in the positive Prescription ?

A SASINE without a warrant, not bearing to proceed upon a retout, or precept of *clare constat*, is no title of prescription. Stair, 21st January 1679, Frazer *contra* Hog. — But a procuratory of resignation, with a sasine relative thereto, was found a sufficient title for prescription, tho' the precept was wanting. Fountainhall, 10th June 1697, Administrators of Heriot's hospital *contra* Hepburn.

Title requisite to purchasers of lands.

IN the positive prescription, founded upon the possession of heirs, it is sufficient to produce the naked saines, without either the precepts of *clare constat* or retours, upon which they are founded. Stair, Gofford, 15th February 1671, Earl of Argyle *contra* Ld. M'Naughton. — In a competition about the property of a land-estate, one of the parties founded upon the positive prescription, and produced instruments of sasine in the person of his author, and his predecessor, standing together for the space of forty years, proceeding upon precepts of *clare constat* ; it was objected, with regard to one of the instruments of sasine, taken in the 1696, That it was null, the superior, who granted the precept of *clare constat*, being at that time dead, which was offered to be proved, whereby the precept fell, and consequently this sasine could be no foundation for a positive prescription. In answer it was admitted, That if the sasine, upon which the prescription is founded, were null in point of solemnity, as wanting symbols, or such like, there could be no prescription : But where there is no objection to the sasine itself, but to the warrant of the sasine, which the possessor is not bound to produce to support his prescription, the very intendment of the statute is, to remove all objections against the title, other than that of falsehood. The Lords found, That the infeftment, in the 1696, is a habile title of prescription. 9th November 1739, Purdie *contra* Lord Torphichen. — But it was found, That the sasine of an heir, who did not himself possess the whole space of forty years, never being renewed in his successors, who all of them continued to possess as apparent theirs, was no sufficient title for prescription. Stair, 15th February 1671, Earl of Argyle *contra* Ld. M'Naughton Fountainhall, 25th June 1680, Earl of Queensberry *contra* Earl of Annandale.

Title requisite to heirs.

SASINE upon hasp and staple, having no other warrant but the clerk of the burgh's assertion, is not a sufficient title for prescription, as

Sasine upon hasp and staple.

not contained in the act of parliament 1617, which mentions fines upon retours, charters and precepts of *clare constat*, but no word of hasp and staple; so that acts of parliament, being *strictissimi juris*, are not to be extended; and these being omitted, it must be presumed to be *casus de industria omissus*, and not *per incuriam*. Fountainhall, 10th June 1697, Administrators of Heriot's hospital *contra* Hepburn. — The contrary found. Dalrymple, Forbes, 28th November, Dalrymple, 13th December, and Forbes, 25th December 1705, Ker *contra* Abernethie.

Title of part
and pertinent.

THE title of part and pertinent, with forty years possession of land, found to give a good right, even in competition with one specially infest in the land. Forbes, 22d February 1711, Earl of Leven *contra* Finlay. — But this not sustained where the charter bearing part and pertinent was late, and consequently could be no warrant for the possession. Forbes's MS. 2d July 1714, Dunbar of Northfield *contra* Sinclair of Dun.

Title requi-
sit in rights
granted by ec-
clesiasticks.

A TACK of teinds null, as being set without consent of the patron, was found validated and unquarrellable by forty years possession. Stair, Gosford, 7th July 1677, Parson of Prestonhaugh *contra* his Parishoners. — The like. Stair, 4th February 1681, Robertson *contra* Arbuthnot. Stair, 14th July 1675, College of Aberdeen *contra* Earl of Northesk. Fountainhall, 27th June 1696, Earl of Leven *contra* Parishoners. — An exception in a removing, founded on the defender and his predecessors and authors infestment, cled with forty years possession, was repelled, in respect the lands were kirklands, and none of his own or predecessor's infestments were confirmed; notwithstanding it was alledged, That he was not obliged to dispute the validity of his author's right after so long possession. Durie, 17th February 1627, Douglass and Stewart *contra* Tenants.

Title requi-
sit to carry a
right to fal-
mon fishing.

A GENERAL clause in the *tenendas* of a charter *cum piscationibus*, with forty years possession, was found a good title to carry a falmon fishing, it being a charter of a barony. Stair, Gosford, 7th February 1672, Fullerton *contra* Earl of Eglington. — A Charter granted to a burgh with a general dispositive clause *cum piscationibus*, with forty years possession, was sustained as to a falmon fishing. Stair, 26th January 1665, Heretors of the fishing of Don *contra* Town of Aberdeen. Stair, 6th December 1678, Brown *contra* Town of Kirkcudbright. — A charter from the crown, with a general clause in the dispositive part *cum piscationibus solet. & consuet.* found sufficient to carry falmon fishing, joined with forty years possession. Stair, 27th February 1667, Earl of Southesk *contra* Lady Earlshall. — A bishop's charter disposing of a falmon fishing, with forty years possession, was sustained as a good right, notwithstanding that falmon fishing is *inter regalia*, because the bishop might have got a grant from the King; and the author's title is presumed in this case *presumptione juris & de jure*, as well as in the case of lands, or other subjects *in commercio*. Stair, 13th January 1680, Brown *contra* Town of Kirkcudbright. — In an action for fishing in the water of Dee, the Lords gave many instances of men having falmon fishings where they had no land on either side of the water, by the space of many miles; and that the privilege and servitude of drawing

drawing their nets on the adjacent lands depended upon their possession, and was to be sustained if it were possessed past memory of man. Haddington, 15th July, Hope, (*Fishing*) 18th December 1623; Forbes *contra* Ld. Monimusk.

COMING to mills belonging to subjects, without a title in the master of the mill, not sufficient to infer thirlage, tho' it were for 100 years, it being *res mera facultatis*. Balfour, (*Mills and Multures*) Sinclair, 14th March 1541, Ogilvie *contra* Tenants. Haddington, 4th December 1610, Fenton *contra* Tenants. Hope, (*Mills and Multures*) 11th July 1624, Earl Murray *contra* Earlsmill. Auchinleck, (*Mills and Multures*) 24th January 1629, Davidson *contra* Tenants. — The like, tho' the multures paid were as great as the thirle multures. Durie, 14th March 1635, M'Kay *contra* Menzies. Home, January 1682, Buntein *contra* Boyd. — But 40 years possession of dry multures is sufficient to constitute thirlage, without any other document or instruction, because the payment of dry multure cannot be constructed to be *voluntatis* but *necessitatis*. Gosford, 22d, Stair, 23d July 1675, Kinnaird *contra* Drummond. — In a question about thirlage to a mill, which originally belonged to the mendicant friars, the fact came out, That the proprietars of the land alledged to be thirled, had not only paid intown multures for the space of 40 years, but had been in use of leading millstones and mending dams, which was pleaded by the proprietor of the mill to be among the severest points of astringtion, and never to be presum'd voluntary, more than payment of dry multure; it was further added, That by act of sederunt 16th December 1612, ten years possession before the reformation, and 30 or 40 since, is sustained as a good right with regard to subjects that belonged to the church. Answered, That, dry multure alone excepted, it is a prerogative royal, competent to no subject to infer astringtion by possession; and for the act of sederunt, it is in favours of feuars, heretable possessors of the lands, and against the churchmen and their successors, but not in their favours, to give them right to all lands found in their possession, much less to a thirlage of other mens lands. Found, That possession, tho' by laying in of dams, and leading of millstones, does not infer astringtion, even in favours of churchmen possessing, whether before or after the reformation. Stair, 17th July 1677, Ross *contra* M'Kenzie. — Immemorial use of coming to an abbot's mill, found not to induce a thirlage, unless the pursuer had act or inrolment of court, or decret of abstraction before the 40 years, to be a title of prescription. Marcus, (*Thirlage*, appendix) January 1681, Earl of Haddington *contra* Feuars of Melrose.

What title
requisite for
thirlage?

IN a process for abstracted multures, the pursuer was infest in the mill, which was the only mill of the barony; "with the astringted " and thirled multures of the said whole barony;" the defender's lands were a part of the barony, and the barony with the mill thereof were once the King's property; this title, join'd with immemorial possession of the multures of the said lands, and the services of casting mill-dams, leading millstones, and repairing the mill, was found relevant, and admitted to the pursuer's probation, albeit more be required in mills pertaining to private persons. Durie, 5th February 1635, Dog *contra* Muschet.

ONCE found, and but once, That all the lands of a barony are understood to be thirled to the mill of a barony, without any thirlage in writ; upon this footing, that thirlage is a natural servitude, belonging to the Baron *qua* such. Durie, Hope, (*Mills and Multures*) 17th July 1629, Ld. Newliston *contra* Inglis. But in no other case has this been sustained, without further circumstances to qualify astrictiō. And so in an action of thirled multures, the Lords sustained the summons founded upon a tack of the mill, with thirle multures used and wont, in respect of certain acts of court of the barony, made by the bailie of the barony, whereby the tenants were convict for abstracting of multures. Hope, (*Mills and Multures*) 25th May 1614, Mill *contra* Falconer. — In a pursuit for abstracted multures, the pursuer founding on these following grounds, *viz.* 1^{mo}, A feu set to him of some lands, and of the mill in controversy, with the pertinents thereof, it being the only mill in the barony. 2^{do}, Upon divers acts of thirlage made by the granter's bailie in favours of the pursuer. 3^{tio}, 40 years receiving thirle multure from the tenants: Corroborated. 4^{to}, By decreets against them in the said bailie-court; the Lords assilzied the defenders, because the feu contained no express thirlage of the said lands to the mill disponed, and that the bailie could not thirle the lands without the master's express warrant; so that whatever decreets, possession, &c. had followed thereupon, the master disponer, who was neither called nor consented, could not be prejudged by his bailie's deed. Durie, Hope, (*Mills and Multures*) 12th July 1621, Douglas *contra* Earl Murray. — Infestment in a mill, *cum astrictis multuris usitat.* & *consuet.* tho' the mill was the only mill of the barony, which, it was alledged, did import, that the whole lands within the barony were astricted, was found not sufficient to infer astrictiō against the tenants of the barony, tho' they had been in the constant use of coming to the said mill. It being answered, That the *usitat.* & *consuet.* in the saine being relative, would give no interest, unless the pursuer could show that the defender's lands were astricted before the date of the infestment; That the mill of a barony *per se* imports not astrictiō; and lastly, That the use of coming to a mill is *voluntatis* not *necessitatis*. Spotiswood, (*Mills and Multures*) Durie, 13th July 1632, Earl of Morton *contra* Tenants of Muckartshire. — Yet infestment in the mill of a barony, with 40 years possession of multures, was sustained as a good title to pursue for abstractions. Stair, 14th January 1662, Nicolson *contra* Feuars of Tillicultrie. — A thirlage was found constituted by an old decreet against tenants, with 40 years possession conform, tho' the master was not called. Stair, 24th June 1665, Montgomerie *contra* Wallace. — A pursuit for astricted multures being founded on a very old charter from an Abbot, bearing *cum multuris totius parochiæ, &c.* and on a decreet of the Lords at the instance of the feuar of the mill against some of the heretors, tho' in absence against the present defender's predecessor, but *in foro* against others; the Lords, in regard that the decreet, tho' in absence, was valid, wherein the defender's author was decerned in all time coming, and that it was a standing decreet by the space of 40 years, and never questioned; found, That there was no necessity to debate upon any other ground, (such as the old Abbot's power to astrict, &c.) than that the pursuer had thereby right to the said multures, seeing the defenders did not deny that they were in use to come to the mill, but preten-

pretended a liberty and use to go likewise to other mills, the contrary whereof appeared by the said decret, which was never questioned, and now could not, all exceptions to it being prescribed; and yet the Lords assailed from bygones, and services not contained in the said decret. Stair, Dirleton, 7th June 1676, Ld. Pittarrow *contra* Tenants of Redmire. — Infestment in a mill, bearing the multures of the defender's lands *per expressum*, tho' flowing *a non habente potestatem*, with 40 years possession, found a sufficient constitution of a thirlage; and yet the multures paid were small, to make going to the mill, be considered as *meræ voluntatis*, only no greater multure was paid by others. Stair, 7th December 1677, Henderson *contra* Arnot. — An act of thirlage of a Baron court, with 40 years possession conform, found sufficient by prescription, even against feuars, who had a right freeing them from the servitude, of an older date than the act. Stair, 11th January 1678, Lord Balmerino *contra* Cockburn. — In a thirlage constituted by possession upon an act of court, the defender's alledgeance, That he was constantly free of thirle as to all bear that tholed not fire and water within the thirle, which was not a latent abstraction, but known and allowed, was found relevant to free him as to that particular, *nam tantum præscriptum quantum possessum*. Stair, 23d January 1673, Bairner *contra* Coalzier.

IN a thirlage to the King's mill, where no writ was shown, but possession to constitute the thirlage, the teind was not found to be thirled, which belonged not to the King when he granted the infestment of the mill; tho' it was alledged, That the tenants, past 40 years, paid multures of all their corns promiscuously, without exception of teind. Gilmour, 3d, Stair, 8th January 1662, Stewart *contra* Feuars of Aberbadnoch. — Yet, in the like case the Lords found the teinds astricted. Stair, 21st January 1681, Grierson *contra* Gordon. Tho' it does not appear that this was even a King's mill. N. B. Marcus, (*Thirlage*, appendix) narrates the decision thus, That where the minister hath not the teinds in victual, but in money, if the tenant grind the same, he ought to grind it at the master's mill, and pay multure therefore. — A superior having feued out his barony to his vassals, astricting their *omnia grana crescentia* to the mill of his barony, the vassals, past memory of man, paid multure for the growing corns of all kinds, without any distinction betwixt stock and teind; but, at last, the vassals conceiving that the stock only, and not the teind, (which never belonged to the superior) was included in the aforesaid astriction, they, for that reason, abstracted their teinds, and refused to pay multure for the same. It was argued, on the other side, That the words of the astriction carried teinds as well as the other growth of the lands, and therefore should the titular even draw the teinds, *ipsa corpora*, the vassal must be liable in an equivalent of dry multure. The Lords found, That the vassals, during the years of prescription, being in use to bring their whole corns growing upon their lands to be grinded at the superior's mill, without demanding any abatement upon account of teind, relevant to include the teind within the astriction. 5th July 1727, Mr. John M'Leod *contra* Vassals of Muiravenside.

THE measure of a mill, by which the multure was exacted from such as were thirled, being much larger than the Linlithgow measure, which is the common standard of the kingdom; yet the Lords considering, That every mill has its own custom, found it relevant to augment

the quantity, if the master of the mill proved 40 years possession in exacting no less. Gosford, 2d February 1672, Stair, 2d January 1673, Forbes *contra* Magistrates of Inverness. Fountainhall, 5th February 1697, Muirhead *contra* Feuars of Addington.

Title requisite for a servitude of pasturage.

FORTY years possession of a pasturage, upon the title of part and pertinent, was found a sufficient title, tho' a prior tack was produced, in virtue of which, it was alledged, the possession of the pasturage begun, which was not found sufficient to take off the positive prescription. Stair, Fountainhall, 27th November 1677, Grant *contra* Grant. --- The probation of 40 years possession of pasturage, being made up, partly by the natural possession of pasturage, and partly by receiving a small sum yearly in lieu thereof; the Lords restricted the servitude to that sum, and declared the servient tenement liable thereto in time coming, and not to be liable to actual pasturage. Fountainhall, 20th January 1682, Cockburn *contra* Brown. --- An infeftment of lands, *cum communi pastura*, not found sufficient to carry a right to common pasturage in a muir, in the property of which another was infeft *per expressum*, tho' he had been in possession conform, only the said possession had been frequently interrupted *via facti* by the proprietor of the muir. Durie, *ult.* June 1629, Sheriff of Cavers *contra* Turnbull.

Title requisite for carrying right to a subject inter regalia.

FORTY years possession, with a title from a subject, found sufficient to establish a fair, tho' the King alone can constitute fairs, the prescription inferring a presumption *juris & de jure*, that the right was originally derived from the King. Stair, 2d December 1679, Farquharson *contra* Earl of Aboyn. --- The like, with regard to a right of a ferry-boat. 22d December 1731, Tarbat *contra* Bogle.

Servitus itineris.

PRESCRIPTION of a road to the kirk through a neighbouring heretor's corn-field, not sustained without a title, unless upon possession past memory of man. Haddington, Durie, 27th June 1623, Neilson *contra* Sheriff of Galloway. --- The like. Gosford, 20th June 1673, Henderson *contra* Weemyfs. --- An heretor having sold off lands, through which his road lay to the parish-church, but neglecting to reserve the road out of the disposition, yet continuing in the same road for 28 years thereafter, till he was challenged by a declarator of freedom; the Lords allowed him to connect the 28 years with the time the lands were in his own possession, to make out a prescription. Fountainhall, 17th July 1700, White *contra* Weemyfs. --- The Lords found, That no publick highway can be made upon a private person's property without his consent, or the uninterrupted possession of 40 years; but it being proved, That the fishers of Dunbar coast, when they could not, by reason of high winds, make the harbour of Dunbar with their boats, were in use of landing on the Duke of Roxburgh's ground, and the lieges in use of leading fish and necessaries for fishing to and from Dunbar, and the neighbouring country, through the ground, upon payment of eight pennies Scots for the loaded horse, and ten pennies for the loaded cart; the Lords declared the Duke's property affected, that there should be still access to the lieges passing through the said ground, upon the afore said ends, upon paying the duties afore said. Forbes, 5th June 1713, Duke of Roxburgh *contra* Town of Dunbar.

A REAL

A REAL servitude of furnishing shear-dargs in harvest, tilling the pursuer's land, and leading of his fuilzie, found established by immemorial possession, tho' the same was only done by the defender's tenants, without any proof of his knowledge, and tho' there was not so much as any general clause in the pursuer's or defender's infeftment, to support the same. Durie, 11th March 1634, Sherriff of Galloway *contra* Earl Cassils.

What title
requisite to the
prescription of
annual duties
and prestations?

IN a process against feuars holding of a town, concluding against them to bear a proportion of the private stents of the town, the Lords sustained immemorial possession of the feuars, bearing private stents, as relevant to make them liable in time coming, altho' their charters from the town bore the *reddendo* of particular feu-duties *pro omni alio onere*. Stair, 14th July, Dirleton, 7th November 1674, Town of Inverness *contra* Feuars of Drakies. — Found, That a town had no right to uplift small customs for passage of bestial through their street, seeing all the lieges have liberty to drive their goods through the King's publick way and streets, without any exaction of that nature, except it had been granted for a publick good of the kingdom, such as bridges, or the like common works; and this notwithstanding the town founded on a charter from the King of their liberties, customs, and of small customs expressly, which was ratified in parliament; and that, conform thereto, they had been in continual possession of exacting these small customs. Durie, 15th November 1621, Town of Linlithgow *contra* Fleshers of Edinburgh. — The act 156, parl. 1592, entituled, *The exercise of crafts within suburbs adjacent to burghs, forbidden*, does not extend to suburbs which are within a regality or barony; yet a royal-burgh having been in immemorial custom of levying a duty from craftsmen, exercising their trade in a suburb within a barony, insisted they had a right to continue the exaction by the positive prescription. Answered, The craftsmen were no incorporation, and the duty paid by any of them could hurt none but themselves; which the Lords sustained, and decerned only against those who had been in use of payment. Stair, 21st July 1669, Town of Perth *contra* Weavers of the Bridgend of Perth. — In the 1669, after hackney-coaches came to be used, the magistrates of the Canongate made an act, exacting the sum of ten merks for each hackney-coach employed in the burgh, in satisfaction of the damages done to the caufways; this exaction was continued, without challenge, beyond the long prescription, till at last it came to be disputed in a suspension at the instance of the hackney-coachmen, who pleaded, *1mo*, That the act of council, imposing the toll, was *ultra vires*, against the publick law, and length of time could not give it force. *2do*, The keepers of the hackney-coaches are not incorporated, and the deed of one cannot hurt another. The Lords found, That in regard the payment of duty of caufway-mail upon the hackney-coaches, since the act of the council and magistrates of the Canongate, in the 1669, was acknowledged by the keepers of hackney-coaches, the magistrates have right to exact that duty conform to the said act. 18th February 1727, Magistrates of the Canongate *contra* Keepers of the hackney-coaches. — A Nobleman, who had right of justiciary and constabulary within a burgh for judging criminal causes, having, by contract, agreed many years ago with the town and the bishop of the place, that, out of a list given in by the town council, the bishop should name one bailie, the Nobleman another, and the magistrates the third; the question being, Whether the Nobleman

bleman and his depute bailie might dispose of the fines as they pleased, or if they were to be paid in to the town-treasurer, to be applied to the publick uses of the burgh; For which the town alledged prescription with the aforesaid agreement, and their act of council for their title. The Lords nevertheless found, That their said act of council and contract was no sufficient title for prescription, and so preferred the Nobleman's bailie to the fines. Forbes, 24th, Fountainhall, 25th July 1707, Earl Panmuir and Lord Grange *contra* Town of Brechin.

A CLAIM was sustained at the instance of the minister of Leith against some merchants in Edinburgh importers of herring, dry fish, &c. at Leith and Newhaven, to pay 20 shillings the last of herrings, and the 20th part of the kelling and ling, he having proved forty years possession of the said burden. Stair, 10th February 1666, Minister of North-Leith *contra* Merchants of Edinburgh. — One who had some burrow-acres, quarelling the payment of the second minister's stipend, upon this head, that he paid his whole teind to the first minister, was found liable, in regard that the heretors of the burrow-acres had been in use, past memory of man, to pay the second minister's stipend over and above the teind paid to the first minister. Stair, 22d July 1668, Boswel *contra* Town of Kirkcaldy.

AN heretable bailie of regality being infest with the connexes and services belonging thereto, was found to have a sufficient title to certain quantities of oats and straw and hens, that had been exacted for forty years, out of the defender's lands, lying within the regality; tho' it was alledged, That these being part of the rent of the lands, could belong to none but the proprietor. Durie, 11th March 1634, Sheriff of Galloway *contra* Earl Cassils. — The fees due to M'Clay Coroner of Arran for his office, *viz.* a firloft oats, and a lamb for ilk plough-horse, was sustained conform to his, and his predecessor's possession past memory of man, tho' he was not infest *per expreßum* in the said duty libelled, upon consideration that the sheriffs, stewards, constables, &c. had not their fees insert in their infestments, but possessed them, as they had done, past memory. Haddington, 10th July 1623, M'Clay *contra* Ld. Skelmurlie. — Forty years possession was found to give right to a Sheriff to ride a fair, and to exact so much for the sheriff's gloves, and for the price of the best staig in the fair. Stair, 11th July 1672, Earl of Callendar *contra* Town of Stirling. — The like. Newbyth, 18th July 1665, Douglass *contra* Town of Jedburgh. — The Sheriff of Inverness pursued a declarator that he had right to three days salmon fishing in the water of Ness, under the bridge, every summer, as a casualty of his Sheriffship, which was sustained upon 40 years possession: For since this was but a servitude upon the fishing, it was found that it might be constituted by long possession, as sheriff's gloves and other casualties of offices are. Stair, 13th December 1677, Earl Murray *contra* Town of Inverness. — The Lords found an heretable right of sherivalty, *cum omnibus feodis, devoriis, seu casualitatibus, eund. spect. aut quæ ad dictum jus & officium pertinere dignoscuntur*, sufficient to found a title of prescription, to set up weights, and uplift the duties thereof, in an annual fair at a burgh of barony within the shire, altho' the baron's charter of erection carried power to him to hold fairs and exact all the profits and duties thereof. Forbes, 27th December 1709, Cunningham of Craigends *contra* Earl of Eglington.

THE

THE heretors of a water, having raised against a neighbouring heretor a reduction and declarator, that they might imploy whom they pleased to pack and cure their salmon, make the barrels, &c. and he alledging, That his tenants had been in the immemorial possession of being imployed in that fishing, and to be paid their wages in salmon, and to debar and exclude all others; the Lords found no servitude here, but what the neighbourhood had done in imploying these tenants to fish was *actus meræ facultatis*, for their own accomodation and convenience, which did not oblige them to continue to do so for the future. Forbes, 14th, Fountainhall, 15th March 1707, Creditors of Dunfermline *contra* Ld. of Innes.

Positive prescription of other rights.

A TOWN having been in constant use, past memory of man, to bleach and whiten their linen cloth upon a loaning belonging to a neighbouring heretor, and contending, that they thereby had prescribed a servitude; found, That there was no such servitude known in our law, and that the possession must have been held by mere tolerance, and not by way of right. Fountainhall, 13th February 1708, Dr. Carmichael *contra* Town of Falkland.

A MILL having been in immemorial possession of a burn, an absolute right was found established thereto, so as to bar the possessors of the ground, through which the burn ran, to divert the same for watering their fields, tho' they had been in the custom of using the burn for this purpose, the space of thirty four or thirty five years; but another heretor was allowed to continue the watering, who had used the burn so for forty years. Stair, 13th July 1670, Beaton *contra* Ogilvie.

— One having been in the immemorial uninterrupted possession of water, brought from a lake along a dam in his neighbour's ground to his own mill and coal-works, and of casting seal, &c. upon the next adjacent ground, for repairing the dam, was found to have prescribed a right of servitude thereto. Forbes's MS. 5th February 1714, Brigadier Preston *contra* Colonel Erskine.

AN heretable bailie of an Earldom, having, under the colour of that title, acted also, for above forty years, as heretable bailie of a regality, which also belonged to the Earl, his constituent; this possession, as wanting a title, was not found to make a prescription as to the bailery of regality, even in the person of a singular successor, who purchased the office of bailie of the Earldom. Forbes, 9th July 1713, Duke of Montrose *contra* M'Aulay.

THE Lords declared it lawful for all persons to import and vend in a royal burgh, upon mercat and fair days, shoes, boots and slippers of all kinds, without distinction, notwithstanding that the corporation of shoe-makers there, (whose seal of cause, or charter, conveyed powers to make necessary regulations for the good of the corporation) had, beyond the years of prescription, been in use to allow strangers to import for sale, upon such mercat and fair days, only single-sol'd shoes or pumps, and to seize all high heel'd shoes, boots and slippers so imported, and to commit the importers to prison. Forbes, 12th January 1711, Inhabitants and Burgeses of Perth *contra* Shoe-makers of Perth. — Positive prescription cannot run without a title; and therefore not in face of the publick laws, anent the election and continuation of magistrates of royal burghs. Stair, 27th January 1681, Jack *contra* Town of Stirling.

Title requisite to prescription of moveables.

IN a pursuit for a church bell, lent by one parish to another, the defence upon the positive prescription, was sustained by 40 years possession. Durie, 7th December 1633, Kirksession of Aberherder *contra* Parishioners of Gemlie.

The title must be in its nature exclusive,

A VASSAL to a subject, by his immediate superior's forfeiture, coming to be retoured and infest in his lands, as holden of the crown, and the forfeiture being thereafter gifted; in a question with the donatar, the Lords refused to sustain 40 years possession upon that retour to found prescription, in respect that the lands did truly hold of the crown at the date of the retour, by virtue of the forfeiture, which therefore could not bar the King of his right of alienating *quandocunque*. Forbes's MS. 8th July 1714, Gordon *contra* M'Intosh of Thatilk.

What kind of possession requisite?

IN a competition of two heirs, one of them founding upon the positive prescription, the liferenter's possession flowing from the defunct predecessor, was not found profitable to either of them in prejudice of the other; but the Lords declared, That the liferenter's possession should be the possession of him who should be found the righteous heir. Stair, Gilmour, 28th November 1665, Younger *contra* Johnstons. — In order to the completing the long prescription, the liferenter's possession was found the fiar's possession. Newbyth, 28th November 1665, Thomson *contra* Young and Porteous. — A reverser's possession by a back-tack was found the wadsetter's possession, in a case where the wadsetter pleaded the positive prescription against a party who had a right to the lands, prior and preferable to both wadsetter and reverser. Forbes, 19th June 1713, Murray *contra* M'Clellan. — In a proof of 40 years possession of a salmon fishing, a party having proved his possession as to fishing by angle, spear and wand, and that it was accounted a part of his tenants livelyhood, and that the river fronting his ground was ever reputed his, &c. this was not found a sufficient possession for salmon fishing. Fountainhall, 3d December 1701, Forbes of Waterton *contra* Udney of Auchterallan.

Connection of possession.

A WIFE's infestment granted by her husband, who was not himself infest, has not the benefit of the positive prescription by the husband's possession; it being necessary to validate her infestment, that she herself possess 40 years after his death. Stair, 21st January 1679, Frazer *contra* Hog. — A superior having feued lands to one who continued to come to the superior's mill for eight or nine years thereafter, and having next feued the mill to another, *cum multuris solitis*, &c. and the party still continuing to go to the mill, and to pay insucken multures for the space of 34 years: In a declarator of thirlage, the Lords found the right and possession of the superior, the common author, was to be conjoined to the pursuer's right, to make up the prescription of 40 years. Marcus, (*Prescription*) December 1682, M'Pherson *contra* M'Intosh.

AFTER the major part of lands holding ward were alienated, the vassals heirs continuing to possess for 40 years, this found sufficient to exclude recognition, and the last heir having granted some infestments of annualrent, their possession, after his decease, was conjoined with his former possession, to make out the years of prescription. Forbes,

bes, 25th July 1712, Monrcief *contra* creditors of Ballo: Fountainhall, observes it 26th December 1711, Earl Leven *contra* Ld: Ballo.

ONE infest in the office of a forrestry, and thereby having right to a yearly quantity of victual payable out of certain lands, as the fees of the said office, pursuing for bygones, and the defender opposing the positive prescription; the Lords found the exception relevant upon the act 1617, That the defender had bruiked his lands for 40 years, free of any payment, except his feu-duty, and so had prescribed *liberum tenementum*, free of the burden libelled, even as if the pursuer had claimed an annualrent out of the saids lands, which the exception of the positive prescription would, in law and reason, have excluded. Durie, Spotiswood, (*Prescription*) 22d July 1634, Forrester *contra* Feuars. — The like, where the pursuit was upon an apprising. Dalrymple, 2d February 1705, Wilson *contra* Innes of Auchluncart.

Effect of the positive prescription.

A REGISTERED reversion found good against a party asserting an irredeemable right to the lands by the positive prescription, as having been in possession above 40 years upon a charter and sasine. Home, January 1727, Elliot *contra* Maxwell.

Vicennial Prescription of holograph Writs.

THE act 9, parl. 1669, introducing the 20 years prescription of holograph bonds extends to bonds granted before the statute. Fountainhall, 17th November 1692, Hamilton *contra* Hamilton. — The contrary. Forbes, 15th January 1714, Edmonston *contra* Edmonston.

THE vicennial prescription of holograph writs is only *quoad modum probandi*, therefore 'tis sufficient to prove the verity of the subscription by the defender's oath, and the pursuer is not bound to prove resting owing. Bruce, 28th July 1715, Earl Leven *contra* Major Arnot.

Vicennial Prescription of Retours.

A YOUNGER brother being retoured as heir to his father, upon the supposed death of an elder brother, who was out of the country; the elder brother came home, and died without ever quarrelling the service; the retour was found null by exception, at the instance of a creditor of the defunct's, who had charged him to enter heir within the twenty years, notwithstanding of the act anent reduction of retours. Stair, 11th January 1673, Lamb *contra* Anderfon. — The act 13, parl. 1617, introducing the vicennial prescription of retours, was found mainly to relate to erroneous services, where a remoter agnat is retoured heir in prejudice of a nearer, and not to heirs served to quarrel their own retours, seeing minority and lesion was a ground of reduction before that act of parliament, and needed no new law. Fountainhall, 11th July 1701, Lady Edinglassie *contra* Ld. Pourie.

Præscriptio decennalis & triennalis:

THE Lords repelled the exception of decennial and triennial possession, being proponed against the patron; and this in respect of the express words of the rule in chancery, *viz. Dummodo ad beneficium* Will not defend where the title to be minister is per challenged.

per eos ad quos præsentatio pertinet, præsentati fuerint. Hope, (Kirk) 24th July 1622, Earl Wigton *contra* Greig.

*Tis but a presumptive title, and if the title be produced, it must be the rule.

AN augmentation being granted to a minister by the masters of the college, who were titulars of the tithes of that parish, and he having been eighteen years in possession, yet the Lords found, That the right granted to him or his predecessor was null, in respect it was not subscribed by the major part of the regents, but only by two of seven; and that the right being null could not give the minister the benefit of *decennalis & triennalis possessio*, which is but a presumptive title, & *cedit veritati*. Home, February 1684, Barclay *contra* Provost and Regents of St. Salvator's college, St. Andrews. — Thirteen years peaceable possession by a minister of his stipend, was found relevant against an old decret of locality, burdening the parishioners with a lesser stipend, unless it were instructed, that the pursuer or his predecessors had possessed by that decret. Stair, 28th November 1676, Semple *contra* his parishioners. — The contrary. Stair, 24th February 1681, Leslie *contra* Minister of Glenmuck. — *Possessio decennalis & triennalis* by a stipendary minister of a superplus duty, over and above the quantity of stipend contained in his decret of locality, was refused to be sustained as a sufficient title to pursue for payment of that superplus duty, in respect of the special decret of locality. Forbes, 23d July 1708, Representatives of Rule *contra* Magistrates of Stirling.

*Tis no sufficient title for uncommon prestations.

THE Lords, at the instance of a minister against the parishioners, decerned for a yearly sum out of each weaver's loom, and for the salt made in the parish, tho' these were *decimæ industriales*, in respect of forty year's possession, which at least is required where teinds are only due locally, & *per consuetudinem*; but in the usual teindable species, such as lamb, wooll, &c. *triennalis & decennalis possessio* is sufficient, which difference is observable. Stair, Fountainhall, 29th November 1678, Mr. John Birnie *contra* Brown of Bishopton. — And yet *triennalis & decennalis possessio* was sustained in a process for bygone services of carrying coals, and certain quantities of butter. July 1733, Minister of Morbittle *contra* Heretors. — Thirteen years possession by a minister, of lands wherein an heretor stands infest, and was in possession before the minister's entry, who could alledge neither mortification nor that it was kirk-land, nor could shew a legal title, was interpreted a tolerance only, so as not to take away the heretor's right by prescription. Gosford, 23d June 1671, Duke of Monmouth *contra* Parishioners of Halfenden.

Connection of possession.

IN a question about the brocard, *Decennalis & triennalis possessor non tenetur docere de titulo*, the Lords found, That the predecessor's possession was the possession of the present intrant. Newbyth, 21st December 1664, Craig *contra* Ld. Hillhead.

Act of sederunt, 16th December 1612.

FOUND, That thirty years possession *in ecclesiasticis* ought to be a sufficient title in place of the old custom, which required ten years before the reformation. Hope, (*Patrimony of the Kirk*) 7th December 1612, Earl Home *contra* Lord Buccleugh. — In a pursuit at a minister's instance against one of the heretors for a cow's grafs, on this ground,

ground, That his predecessor serving the cure, had enjoyed the same for thirteen years, a sufficient presumption that the same was upon a good title, the Ordinary had allowed the minister to prove his predecessor's possession; and the proof coming to be advised, it appeared proved, that the former incumbent had possessed the said cow's grafs for thirteen years and upwards; but it occurred to the court, that after the reformation many of the rights and securities of kirk-lands being lost in these troublesome times, it was necessary to presume the kirkmen's right from their possession; and for that end, thirteen year's possession before the reformation was fixed upon as sufficient. But as in process of time, to prove a party's possession so far back as thirteen years before the reformation became by degrees impracticable, a new regulation was made by an act of federunt, *anno* 1612, which see in Spotiswood, page 190, where it is declared, "That in all time coming, the Lords will decide all questions arising between parties anent the right of kirk-lands and livings pertaining to kirkmen, by their possession of the same kirk-lands and rents thereof for the space of forty, or at least thirty years, continually and immediately preceeding the intenting of their actions, or proponing their defences concerning their rights, when writs cannot be produced to verify the said lands, &c. to have pertained to the kirk of before." On consideration of which act, and that this brocard did never relate to any thing but kirk-lands and livings, and nowise to a minister's horse and cow's grafs, which had its original long since the reformation, the Lords assailed. 12th November 1737, Minister of Dunipace *contra* Lady Dunipace.

Septennial Prescription.

THE act 5, parl. 1695, takes only place in bonds granted for liquid sums. Bruce, 4th February 1715, Borthwick *contra* Crawford. Takes only place in bonds of borrowed money. --- And therefore the benefit thereof was denied to a cautioner for a tutor, that he should make true and faithful accompt to his pupil. Fountainhall, 5th January 1709, Flet *contra* Strang. --- For the same reason a cautioner for an heir to the relict, for her yearly annuity or jointure, was not found to fall under this act. Fountainhall, Forbes, 18th January 1709, Balvaird *contra* Ramsay. --- And a cautioner in a contract of marriage, where the husband was bound to have a certain sum in readiness, and to lay it out on good security for his wife's life, and to the heirs of the marriage in fee, claiming the benefit of this act, the Lords found, That the cautioner here being bound *ad factum præstandum*, and not to pay a certain sum of money, his case did not fall within the description of the act. July 1726, Stewart *contra* Campbell. --- It was likewise found, That cautioners in suspensions have not the benefit of this act. Dalrymple, Bruce, 4th February 1715, Hope *contra* Foulis.

Two persons being bound conjunctly and severally in a bond, the one as principal, the other as cautioner, the cautioner was found to have the benefit of the septennial prescription, tho' there was neither clause of relief in the bond, nor a bond of relief intimated to the creditor. Who entitled to the benefit?

ditor at receiving of the bond, which was thought unnecessary, tho' mentioned in the act, the defender being bound expressly as cautioner. 11th December 1729, *Ross contra Craigie*. — A person who obliged himself, by a letter, to procure security to the creditor in a bond granted by others, or to pay the debt himself betwixt and Martinmas then next, was not found to be a cautioner in the terms of this act, so as to have the benefit thereof. Forbes, 16th February 1710, *More contra Forbes*. — Neither was the granter of a bond of corroboration found to be in the terms of this act; he being neither bound as cautioner, nor having a clause of relief in his favours, being only intitled to relief by law, & *ex natura negotii*. Dalrymple, 8th, Bruce, 9th February 1715, *Rutherford contra Scot*. — The statute is in favours of cautioners only, who have a total relief; not of co-principals who have mutual relief, whether that mutual relief arise *ex lege*, or from stipulation; and therefore two persons having granted bond, with a clause of mutual relief, one of them having been charged for the whole by the creditor, was found not to have the benefit of the statute. Forbes, 21st, Fountainhall, 22d January 1708, *Ballantine contra Muir*. — Two persons bound conjunctly and severally in a certain sum, a fourth part whereof was the one's debt, and the rest the debt of the other, and bound to one another in a proportional relief, the one was charged for the whole after the seven years prescription; who pleaded, That he ought to be free, in so far as he was cautioner for his co-obligant. Answered, The act 1695 relates only to the case, where one or more *correi* are obliged to relieve the rest of the whole debt; but where persons engage themselves not from mere friendship and facility, but upon account of having interest in the matter, the statute gives no protection. The Lords found this clause fell under the act of parliament. January 1728, *Muir contra Fergusson*.

Intimation
to the creditor.

A CREDITOR in a writ granted by two co-obligants, being both writer and witness in the bond of relief granted by one of them to the other; this was found a sufficient intimation to intitle the cautioner to the benefit of this act. Forbes's MS. 24th February 1714, *M'Ran-kin contra Schaw*. — And again. 23d June 1714, *inter eosdem*. Dalrymple observes it, 22d June. — Yet it was found afterwards, That the creditor's private knowledge is not sufficient, but that there must be an intimation by way of instrument, under the hand of a notary, at the time of signing or delivering the bond. 14th February 1727, *Bell contra Herdman*.

One cautioner
has not the
privilege a-
gainst another.

IT was found, That action for relief competent to one cautioner against another, is not cut off by the septennial prescription, but runs the course of forty years. February 1726, Forbes *contra Dunbar*.

Interruption
of the prescrip-
tion.

A PARTY being cautioner for another, and having wrote to the creditor a letter after the term of payment, craving delay, and promising punctual payment by a day, found, That the prescription doth in this case run, not from the date of the bond, but from the date of the letter. Dalrymple, Bruce, 19th January 1715, *Gordon contra Campbell*.

EXECUTING

EXECUTING a summons was not found a sufficient interruption of this prescription, the summons having fallen by lapse of year and day. ^{Diligence during the seven years, what effect it has?} Forbes, 24th January 1712, Stewart *contra* Hill. — Diligence by horning and denunciation within the seven years, found to make the cautioner liable not only for the interest of the bygone annualrents, but also for the annualrents arising due upon the bond after the denunciation till the lapse of the seven years, and from that till payment. Dalrymple, Forbes, 24th February 1714, M'Giligan *contra* Monro. — Found, That arrestment used against the cautioner, is sufficient to preserve to the creditor all manner of diligence competent against the cautioner for what fell due within the seven years, tho' it was pleaded upon the express words of the act, That any diligence raised within the seven years must be followed forth after the seven years, but no diligence could be insisted in; it being answered, That the statute intended an *ipso jure* liberation to the cautioner for what should fall due after the seven years; but as to what falls due within that space, a proper prescription is introduced to be interrupted by any thing that interrupts another prescription. 9th January 1728, Hunter *contra* Adair. — The same was found thrice before, anno 1717, Hunter *contra* Muir. December 1720, M'Cornock *contra* Coltran. And February 1726, Fairholm *contra* Cuningham.

Quinquennial Prescription.

FOUND, That the act 9, parl. 1669, touching prescription of arrestments, extends to these arrestments which are laid on in the debtor's own hands, and generally to all arrestments. ^{Prescription of arrestments} Falconer, Fountainhall, 10th November 1685, Schaw *contra* M'Neil.

THE quinquennial prescription of arrestments, found interrupted by a multiple-pounding raised by the arrestee, executed against the arrester, and seen and returned by his procurator; for a multiple-pounding is considered as a common process, which any of the creditors may take up and obtain decret upon; whence it must have the same effect in law as if it were at the instance of the arrester himself. 20th July 1732, Crawford *contra* Simpson.

THE quinquennial prescription of mails and duties takes place equally, whether the tenant has possessed by written or verbal tack. ^{Of mails and duties.} 10th July 1729, Nisbet *contra* Baikie.

SOME of several tacksmen of a paper-mill having assigned their interest in the tack, instruments, materials and trading-stock, to one of their own number for so many years, upon his obliging himself not only to relieve them of the principal tack-duty, but also to pay to each of them a superplus duty for their shares yearly of profits, and to leave the instruments, &c. in the same condition; these annual prestations of a superplus duty were found to fall under the act of parliament 1669, about the quinquennial prescription. Forbes, 21st January 1711, Daes *contra* Semple.

A TACK of mails and duties falls not under the act, which regards only tenants who are in the natural possession by labouring the ground. 20th July 1733, Nisbet *contra* Baikie.

A FIAR having a tack of liferent lands from the liferentrix, and after her death commencing to possess as proprietor, so that he did not remove from the ground; the Lords, in a pursuit for bygone duties more than five years after the tack expired by her death, found him not in the case of the act of parliament 1669, and therefore that the debt was not prescribed; but seemed (as the author observes) to go more on the ground of his not being properly a tenant, than that of his not being removed off the ground. Forbes, 9th, Fountainhall, 10th December 1709, Murray *contra* Trotter.

PARTIAL payments made within the five years found no interruption of prescription, as tending rather to fortify the presumption, that all bygones are cleared. 10th July 1729, Nisbet *contra* Baikie.

Of stipend. STIPEND, tho' founded upon a decreet of locality, was found prescribed, not being pursued within five years, unless offered to be proved resting owing by the parishioners their writ or oath. Stair, 23d July 1678, Baird *contra* Parishioners of Fivie. — Teind-duties and stipends due to bishops or other titulars, not being of the inferior clergy, were not found to prescribe within five years; and the act of parliament 1669, touching prescriptions, was found not to belong to bishops revenues. Falconer, Home, 20th March 1683, Hamilton *contra* Herries.

Of bargains about moveables. FOUND, That a bargain of victual not constitute *scripto*, prescribes in five years, *quoad* the manner of probation by witnesses, and that it is not relevant to prove the delivery of the victual *juramento*, unless it likewise be referred to oath, that the price is resting owing. Marcus, (Prescription) January 1683, White *contra* Spence. — In an action for the price of a parcel of sheep, sold and delivered to the defender's predecessor about four years preceeding the date of the action; the question occurred, Whether this action was subject to the triennial prescription of merchant accompts, or to the quinquennial prescription of bargains concerning moveables; it was found to fall under the quinquennial, and not the triennial prescription. June 1730, Ewart *contra* Murray.

Triennial Prescription.

Of spuilzies and ejections. FOUND, That the act of parliament about prescription of spuilzies and ejections concerns only the privileges of the action, *viz.* the *juramentum in litem*, &c. Colvil, January 1587, Constable of Dundee *contra* Ld. Strathmartin. — A spuilzie being restricted to wrongous intromission, because not pursued within the three years, the Lords refused to allow any profits, whether ordinary or violent, and found, That in such actions the pursuer had only right to seek *ipsa corpora*, without any profits or *juramentum in litem*. Durie, 25th February 1624, Dunmuir *contra* Paywell. — The like. Durie, 26th July 1631, Maxwell *contra* Ld. Earlston. — An action of ejection sustained after three years, to the effect to restore the pursuer to the possession, and for payment of the ordinary rent during the defender's possession, but without violent profits. Durie, 16th March 1627, Hay *contra* Ker. — One who had a tack of a coal for a single year, being violently ejected,

ejected, the action of ejection pursued more than five years thereafter, found prescribed, both as to violent profits and repossession, but sustained for damage and interest from the time of the ejection till the expiry of the tack. Durie, 17th December 1631, Lord Loudoun *contra* Ld. Caprington. ---- Intrusion falls as to the violent profits, as well as spuilzie or ejection not pursued within the three years. Haddington, 2d February 1610, Ld. Craighall *contra* Kinninmonth. --- The same found with respect to an action for demolishing a mill. Haddington, 18th July 1610, Corbet *contra* Vanse.

A CRIMINAL process upon a depredation, was found not to interrupt the triennial prescription, when the same fact was thereafter insisted on before the Lords as a spuilzie. For the words of the law are express, "That actions of spuilzie, &c. must be pursued within three years after committing thereof, otherwise never to be heard thereafter." Stair, Dirleton, Gosford, 8th February 1676, Master of Rae *contra* Ld. Dunbeath. ---- And for the same reason a summary complaint exhibited and insisted in before the Lords, upon a fact of intrusion, as in contempt of their authority, was found not to interrupt the triennial prescription of a process of intrusion, founded upon the same fact. Bruce, 1st February 1715, Sinclair *contra* Marquis of Annandale.

THE Lords found, That the three years prescription of warnings is to be counted, not from the warning itself, but from the succeeding ^{Of warnings.} Whitsunday. Durie, Auchinleck, (*Prescription*) Spotiswood, (*Removing*) 6th February 1629, Lady Borthwick *contra* Scot.

THE act 57, parl. 1494, anent prescription of summonses of error, was found not to extend to the verdict of an inquest in a perambulation, with the sheriff's authority interponed thereto, and that it was to be restricted to services of retours. ^{Of summonses of error.} Colvil, November 1582, Ld. Dundas *contra* Elphinston.

Altho' by the acts 1594 and 1617. reductions of retours prescribe in three years; yet it was interpreted by the Lords to be only of reducing them for error or informality of the process, but as to improbation, as false and feigned, 'twas found competent at any time, *cum nunquam prescribitur in falso*, unless it be otherwise enacted by a statutory law. Spotiswood, (*Improbation*) 14th March 1628, Earl Nithsdale *contra* Ld. Westerhall.

Triennial Prescription of Accompts.

THE act 83, parl. 1579 was extended by interpretation to furnishing made to Noblemens houses. Haddington, 23d January 1613, Russel and ^{How far extended?} Erskine *contra* Earl Argyle. --- Aliments prescribe, *quoad modum probationis*, in three years, because of the mention of mensordinaries, &c. and the other like debts. Bruce, 25th July 1716, Hamilton *contra* Lady Orbistoun. --- The like. January 1722, Cumming *contra* Andrew. --- The triennial prescription takes place with respect to goods bought at different times, by one merchant from another, to be sold again, as well as where bought by private parties for their proper use. Durie, 15th February 1630, Ord *contra* Duffs. --- Comprehends not

an action for the price of a horse. Haddington, February 1609. Kinrofs *contra* Graham. — This act not extended to the duty of minister's glebe lands. Spotiswood, (*Prescription*) 14th December 1628. Elliot *contra* . — Nor to intrometters with rents. Durie, 9th March 1633, Maxwell *contra* Welsh, — Nor to soldiers arrears. Forbes 14th July 1709, Graham *contra* Earl Leven and Major Coult. — A pension of 40 merks *per annum* being established by an act of a town council in favours of an advocate, in a process for payment, this case was found not to fall under the triennial prescription. 26th December 1728, M'Kenzie *contra* Town of Burntisland. February 1730, Lockhart *contra* Duke of Queensberry. — Wright and mason work, where the claim is for wages at so much a day, not pursued for within three years, falls under the triennial prescription. Fountainhall, 21st December 1692, Bayn *contra* . Fountainhall, 8th June 1694, Tweedie *contra* Williamson. — A contract of indenture to endure for the space of 12 years, in which the master became bound to pay to his apprentice a certain sum yearly, was found to fall under the triennial prescription. July 1731, Crawford *contra* Simson.

If there's a document in writ.

FURNISHING after three years, cannot be proved by witnesses, either by way of action or exception; but a man having writ a letter to a merchant, desiring him to furnish necessities to his wife, and to place it to his accompt; the pursuit here being founded upon writ, the quantities were found probable by witnesses, even after three years. Stair, 5th July 1681, Dickson *contra* M'Aulay. — The performance of a bargain entred into by writ, falls not under this act. Forbes, 21st February 1711, Watson *contra* Lord Prestonhall. — One having wrote to a young man, desiring him to come and attend his son, and he should have 100 merks of fee, and the said person having accordingly served five years, he pursued the writer of the letter for the 500 merks: Alledged for the defender, That servants fees prescribe in three years. Answered, The pursuer doth partly prove his claim by writ, viz. the letter. The Lords found the libel only relevant to be proved *scripto vel juramento*, in respect it is usual for masters to pay their servants yearly without receipts, and there was no writ after the service acknowledging the fee to be resting. Marcus, (*Prescription*) . November 1682, Tutor of Cragievar *contra* Mr. James Gray.

In accompts prescription commences from the date of the last article.

THE Lords found, That a merchant being in use to furnish divers years, the accompt did not prescribe, but from the last article, tho' some were of opinion, that each article ought to have a several prescription. Dirleton, 16th December 1675, *contra* . — Prescription was found to militate against writers and agents, but not to begin to run till after the last act of current employment. Stair, Gosford, 16th December 1675, Somervell *contra* Executors of Muirhead. — A summons for coals furnished by a coal-grieve, was sustained probable by witnesses, even after three years, because the pursuit was for a continual furnishing, not only these two years, but yearly thereafter, which was in effect an accompt; so that the prescription could not be esteemed to begin till after the last furnishing. Durie, 2d July 1630, Herries *contra* Scot. A merchant-accompt being current, and not intermitted one whole year, prescription begins not to run against the accompt of the first year, till after all the years current

rent. Gosford, 6th February 1669, Douglass *contra* Forsyth. — It was found to be a current accompt, and probable by witnesses, tho' part of the articles were furnished to a defunct, and the rest to his heir. Stair, 26th February 1670, Graham *contra* Ld. of Stainbyres. — Found, That the furnishing made to a wife in her widowity, did not make up a current accompt with things furnished to her husband, altho' she should now be found to represent him, and so be *una & eadem persona* with him; and that it could not be continued to interrupt the prescription of that which was furnished in her husband's time. Fountainhall, 28th July 1680, Wilson *contra* Tweedie and her husband. — Found, That an accompt for a person's funerals, mournings of the family, and their maintenance to the next term, after his decease, taken off by a *negotiorum gestor*, who was neither heir nor executor, did not continue the currency of a former accompt, due by the defunct to the same merchant, to interrupt prescription thereof *quoad modum probandi*. Forbes, Fountainhall, 11th November 1709, Lord and Lady Ormiston *contra* Hamilton of Bangour. — This prescription was found to be interrupted by a single article taken on within the three years. Forbes, 13th December 1709, Mason *contra* Earl of Aberdeen.

A PERSON having been alimeted in a boarding-house, in a process against his representatives for the same, the Lords restricted the libel to three years, preceeding the citation, upon the presumption that the alimenter would not ly longer out of his money, and that former scores were cleared. Dalrymple, Bruce, 23d June 1715, Forret *contra* Representatives of Carstairs. — The like holds with regard to servants fees. Stair, 12th February 1680, Ross *contra* Master of Salton. And so, in cases of this nature, every year's fee or pension runs a separate prescription contrary to what it is in accompts of furnishing. — House-mails, prescribe *de anno in annum*, tho' the tenant continue in possession, and the tenant's removal does not commence the prescription, as in land-rents, tho' it was argued, That possession ought to be an interruption in this case, as well as the taking on of new articles in the case of merchant-accompts. 14th January 1737, Fergusson *contra* Muir.

But in alimement, servants fee, &c. the prescription runs *de anno in annum*.

ACTION upon a writer's accompt, was found to prescribe as to the manner of probation, notwithstanding his having his client's papers in his hand *jure hypothecæ*. Forbes, 29th November 1709, Mason *contra* Earl of Aberdeen.

If prescription takes place, while the constituent's papers are in his writer's hands?

BUT the exception or defence, whereby an agent refuses to deliver up the papers until payment of his accompt, doth not prescribe as to the manner of probation. Forbes, 18th January 1712, Mitchel *contra* M'Adam.

If prescription takes place, where the accompt is opposed by way of defence?

THE Lords refused to deduct any part of the *annus deliberandi*, after the debtor's decease, to hinder prescription against the creditor, because the debtor's heir was served and retoured within the year. Forbes, 16th, Fountainhall, 17th July 1708, Thomson and Hay *contra* Earl Linlithgow and his Curators.

If prescription runs during the *annus deliberandi*?

Three Months Prescription.

FOUND, That the three months prescription, introduced by the 12th act, parl. 1669, and the English statute 1st William and Mary, *cap.* 24th and 26th, concern only pursuits for fines and penalties, incurred by concealing and embazeling the crown's excise; and therefore found, That the impost of two penies upon the pint of ale and beer, imported within a burgh and its privileges, is not liable to the said three months prescription. Forbes, 19th December 1708, Tacksman of the Town of Edinburgh's impost *contra* Straiton.

Who privileged against Prescription?

THE act of prescription 1617, runs against the crown, as well as against the subject; and therefore a recognition at the King's instance was excluded by a 40 years possession of the remainder of the ward-lands not aliened, in the person of a singular successor. Fountainhall, 26th December 1711, Earl of Leven *contra* Ld. of Balloch. See also Fountainhall, 19th February 1686, King's Advocate *contra* Heretors about Dumshorling-muir.

PRESCRIPTION runs against the poor and things mortified for pious uses. Stair, 30th June 1671, Beidmen of Magdalene chappel *contra* Drysdale. Forbes, 9th December 1707, Magistrates of Aberdeen *contra* Irvine.

PRESCRIPTION runs against colleges and universities, since the act touching prescription makes no exception. Gofford, 14th July 1675, King's college of Aberdeen *contra* Earl of Northesk.

THE Lords refused to sustain prescription of a moveable bond in respect of the *interim* minorities of the creditor's nearest of kin, tho' not confirmed executors to him. Forbes's MS. 23d February 1714, Earl Marchmont *contra* Home of Aiton. — The Lords having found, upon the 29th December 1691, That Heriot's hospital, being founded for orphans and minors, prescription could not run against them, they now reponed the other party against this interlocutor, there being as yet not definitive sentence in the cause to make a *res judicata*; and found, That the minority, sufficient to elide prescription, was only that species of minority that runs out and terminates at the age of 21, which is not the case of Heriot's hospital (nor indeed of any *orphanotrophium*) which never expires, the boys being always turned out at their age of 16, whereby it is a succession of perpetual minors, and found this hospital not within the exception of the act of parl. 1617, touching prescription, which is *stricti juris*, and not to be extended, especially *ad casus insolitos & incogitados*. Fountainhall, 17th December 1695, Thomas Fisher and the administrators of Heriot's hospital *contra* Hepburn. — The act 13th parl. 1617, does not expressly except minority from the vicennial prescription of a service as heir; yet found, That it must be deducted from the 20 years of prescription. Fountainhall, 11th July 1701, Lady Edinglassie *contra* Ld.

Ld. of Powrie.—The act 81, parl. 1579, introducing the triennial prescription of spuilzies, runs not against minors, who are expressly excepted in the act itself; and therefore, a minor being ejected out of possession, it was found sufficient for him to intent process within three years after majority. Nicolson, (*Ejection*) 24th February 1610, Cumming *contra* Montgomerie.—But in the act 83, parl. 1579, introducing the triennial prescription of merchant-accompts, &c. minority is not excepted; and therefore a party pursuing for an accompt of ale furnished, the triennial prescription was found to take place, tho' the pursuer was minor all the time. Forbes, 26th, Fountainhall, 27th January 1709, Brown *contra* Brodie. — The septennial prescription of cautionry obligations, runs against minors. Dalrymple, Forbes, 10th December 1712, Stewart *contra* Douglass.

Contra non valentem agere non currit prescriptio.

THE long prescription runs only from the term of payment, not from the date of the bond. Stair, 17th February 1665, Butter *contra* Gray. Stair, Fountainhall, 19th February 1680, Lutefoot *contra* Preston. — A bond being payable to a husband and wife, and longest liver, &c. prescription was not found to run against the wife's life-right of this sum, till after her husband's death, because, before that time, she had no action or interest. Stair, Dirleton, Gosford, 22d June 1675, Gaw *contra* Earl of Weemyss. — The like with respect to a bond payable after the granter's death. Stair, 23d June 1675, Bruce *contra* Bruce. — Prescription of inhibition begins to run from the last execution and not from the registration. Stair, Fountainhall, 19th February 1680, Lutefoot *contra* Preston. — Prescription does not run against an inhibition, but from the date of the comprising used upon the bond, granted by the person inhibited, in respect the inhibitor cannot know of the bond until real diligence be done thereupon. Falconer, Home, 22d November 1682, Moultray *contra* Porteous. — One of two cautioners in a bond having paid the debt upon distress, and got a discharge thereof; the Lords found, That the action for relief, competent to the distressed cautioner against the co-cautioner, did begin to prescribe, not from the time of the distress, but from the time that the debt was paid. Forbes, Fountainhall, 12th February 1712, Scot Lady Halkshaw *contra* Dutchess of Buccleugh. — Prescription of an action of warrandice runs only from eviction. Durie, 26th July 1631, Crichton *contra* Viscount of Air. Fountainhall, 2d February 1710, Hepburn *contra* Dutchess of Buccleugh. — One having disposed a tenement with a servitude *altius non tollendi*, and the heretor of the said tenement having offered to build it higher, he was interrupted. Alledged for the builder, That the servitude was prescribed *non utendo* for the space of 40 years. Answered, Negative servitudes do not prescribe, till after the contrary positive acts are done, just as warrandice, till then the party being *non valens agere*. The Lords found the servitude did not prescribe from the date of the writ, but from the time the party acted contrary to the servitude, by building, or obtaining a declarator of immunity from the servitude. Marcus, (*Prescription*) 28th June 1688, Wilkie *contra* Scot. — In a question of recognition, alledged for the vassal, That one of the base infeftments being granted 40 years before the other, the process of recognition was prescribed *quoad* that subject, and so it could not concur to infer reco-

gnition. Answered, The first base infeftment did not comprehend the major part of the ward-tenement, and the action of recognition could not begin to prescribe, until recognition was incurred. The Lords repelled the defence in respect of the answer. Marcus, (*Recognition*) Earl of Lauderdale *contra* Vassals of Dundee. --- The seven years prescription of cautionry-obligements does begin to run from the date of the bond, and not from the term of payment, tho' before that the creditor is not *valens agere*, for such are the express words of the act. Fountainhall, 17th December 1707, Gordon *contra* Cumming.

*Non valens
vi majore, by
unjust banish-
ment, &c.*

NON valens agere ob defectum tituli, the party being forfeited at the time, was sustained to stop the running of the positive prescription. Stair, 25th January 1678, Duke of Lauderdale *contra* Earl of Tweddale. --- Against the negative prescription it being alledged, That the pursuer was not *valens agere*, being out of the country in his Majesty's service during the usurpation, and durst not appear under the hazard of his life; this was repelled, because in this case there was no forfeiture, and the party might have appeared by a procurator. Stair, 24th July 1678, Whiteford *contra* Earl Kilmarnock. --- But this was thereafter altered, and the alledgeance sustained, That the party was *non valens*. Home, January 1682, *inter eosdem*. --- In a general declarator of single and liferent escheat, it being alledged that the horning was prescribed, the declarator being raised 40 years after it; the Lords, in respect of the King's minority, and interruption of the government, found, That the horning did not prescribe. And the author adds his opinion, that no horning can ever prescribe, because it would make the rebel *lucrari*, by his continuance in rebellion. Dirleton, 8th December 1666, Leslie *contra* Leslie. --- A tutor, for instructing an article of a discharge, producing the pupil's father's holograph accompt-book, whereby it appeared, that the said defunct had intromitted with sums belonging to his tutor as his factor; but more than 20 years having elapsed since the last article of the accompt-book was written, only during four of these years the tutor stood forfeited by the late government; the Lords sustained the accompt-book probative of the article, and repelled the prescription. Fountainhall, 24th and 30th November 1698, Fletcher *contra* Fletcher.

*A woman
under couver-
ture.*

DURING the time a woman is clad with a husband, prescription runs not against her, forbearing to pursue for implement of her contract of marriage, because during that space she is hardly *valens agere*. Haddington, 26th February 1622, Hamilton *contra* Lord Sinclair. Stair, Gilmour, 5th July 1665, Mackie *contra* Stewart.

*Where there
is a medium
impedimentum
to bar pursuit.*

IT was objected against a defender, pleading upon the positive prescription, That for some time during the 40 years there was a liferent of the subject in question in the person of one of the defender's authors, to which liferent the pursuer was consenter, and therefore during that time he was *non valens agere*, in respect by no action could he obtain possession; and the Lords never put parties to the necessity of intending processes, where these processes can serve to no purpose, but to stop prescription, which was sustained. Stair, 28th February 1666, Earl of Lauderdale *contra* Viscount of Oxenford. Stair, 17th January 1672, Young *contra*

contra Thomson. Stair, 25th January 1678, Duke of Lauderdale
contra Earl Tweddale. Stair, 5th February 1680, Brown *contra*
Hepburn.

AN apparent heir in possession of an estate by singular titles, having thereafter purchased in an apprising; it was found, That the apparent heir's possession did preserve the said apprising from the negative prescription. It being pleaded, in the general, That where a possessor has many rights in his person, all of them distinct titles of possession, prescription cannot run against one of them so long as he keeps possession: For what can he demand upon any of these titles but to have the possession; which if he already has, there can be no occasion for an action. But afterwards, upon a reclaiming bill, the Lords found no necessity of determining this point, having taken it up upon a separate footing. 26th November 1728, Fraser *contra* M'Kenzie. ---- A man who was bound in his contract of marriage to provide the estate to himself, and the heirs whatsoever of the marriage, did afterwards make a settlement in favours of the heirs-male of the marriage; and, upon their failure, after several generations, a gift of *ultimus hæres* being taken out, the heir-female claimed the estate in virtue of the contract of marriage; against whom it being objected, That the contract was prescribed; the Lords sustained the answer relevant, That the heir-male was also heir whatsoever of the marriage, and that the heir whatsoever was not *valens agere* until the succession divided, which was long within the 40 years. Marcus, (*Contracts of Marriage*) 22d November 1687, Somervell *contra* Ingliston and Tennant. --- The investitures of an estate standing in favours of heirs whatsoever, the proprietor, anno 1641, did execute a bond of entail in favours of heirs-male. From this period the heirs-male continued to be the same with the heirs whatsoever till the 1692, that they came to split, and then the heir-male claiming the estate upon the said bond of tailzie, the Lords repelled the objection of the negative prescription, in regard the heirs-male were *non valentes agere*. Fountainhall, 31st December 1695, Innes *contra* Innes of Auchluncart.

THE septennial prescription being alledged against a cautionry-obligement, the charger answered, That for a part of the time he lay open to a ground of compensation, and so was *non valens agere*. This answer was repelled. Forbes, 16th, Fountainhall, 20th February 1711, Bourbon *contra* Montgomery. ---- A debtor by bond, being sued at the instance of an assignee, proponed compensation, upon his having alimented the cedent several years before intimation of the pursuer's right. Alledged for the pursuer, The aliment was prescribed *quoad modum probandi*. Answered, That the defender being debtor *intus habens*, he needed not pursue; and tho' he could not pursue after three years, and prove his libel by witnesses, yet he could prove the alimenting by way of defence *prout de jure* after the three years. The Lords repelled the answer, and found the defence probable only *scripto* or *juramento* of the pursuer. Stair, 17th June 1665, Murray *contra* Marcus, (*Prescription*) November 1683, Balfour *contra* Landails. --- The like, where the defence was founded upon bygone rents alledged due by the cedent to the defender; which were found notwithstanding to be soppite by the quinquennial prescription, unless the

defender would offer to prove resting owing by the pursuer's oath. Fountainhall, 23d January 1712, Herries *contra* Maxwell.

One cannot
prescribe a
right against
himself.

THE investitures of an estate, standing in favours of heirs whatsoever, the proprietor, *anno* 1641, did execute a bond of entail, in favours of heirs male; from this period the heirs male continued to be the same with the heirs whatsoever till the 1692, that they came to split; and then the heir male claiming the estate upon the said bond of tailzie, the Lords sustained the defence of the positive prescription, there being a connected series of services in favours of heirs of line standing together for 40 years since the date of the bond, which established the right of the heirs of line. Fountainhall, 31st December 1695, Innes *contra* Innes of Auchluncart.—The estate of Paisly, &c. stood vested in the person of Lord Cochran, tailzied to himself and heirs male; after his decease his grandfather the Earl of Dundonald, who had no right in his person, granted a disposition of the same estate to the Lord Cochran's son and his heirs male; one of whom, above 40 years thereafter, altered the destination, and conveyed the estate to his daughter. The disposition granted by the Earl of Dundonald being null, as *a non habente potestatem*, the estate, in consequence, was found to be all the while *in hæreditate jacente* of the Lord Cochran; upon which the heir male, who had access to make up his titles to the Lord Cochran, after the decease of him who conveyed the subject, as said is, to his daughter, quarrelled the conveyance, as being a gratuitous deed by an apparent heir; and the 40 years positive prescription, in consequence of the Earl of Dundonald's disposition, being pleaded in support thereof, the prescription was not found to run, in respect that no man can prescribe against himself. Home, 26th January 1726, Marquis of Clidisdale *contra* Earl of Dundonald.

Time of Prescription how computed?

IN reckoning the prescription of a bond, whereof the month, tho' not the year, was blank, the Lords interpreted it against the debtor, as if it had been granted the last day of the year. Durie, Spotiswood, (*Prescription*) 23d December 1630, Ogilvie *contra* Lord Ogilvie.—A bond bearing no date of day, month nor year *in facto antiquo*, will be interpreted expired and prescribed, as past 40 years, and so will give no action, unless the pursuer condescend upon the date within 40 years at the intenting of the action. Haddington, ult. November 1610, *contra*.

IN the long prescription of 40 years, the *tempus continuum* is counted, not the *tempus utile*. Stair, 30th June 1671, Beidmen of Magdalene chappel *contra* Drysdale.

Interruption of the negative Prescription.

What diligence
sufficient?

FOUND, That a charge of horning and denunciation is sufficient interruption of prescription, altho' there was no citation before a judge. Spotiswood, (*Prescription*) 18th, Durie, 21st July 1629, Moris *contra* Barclay and Johnston. — But registration alone does not interrupt. Spotiswood, (*Prescription*) 27th November 1630, Lord Borthwick *contra*

contra Ld. Smieton. Gosford, 11th, Stair, 12th, January 1672, Johnston *contra* Lord Belhaven. — Nor was even registration, with letters of horning, found sufficient, seeing there was no charge *de facto* given; tho' the debtor had gone on to suspend the letters; for letters of horning are no interpellation to a debtor, and the suspension was not a document taken by the creditor. Dalrymple, 11th December 1717, Wright *contra* Wright of Kerfe. — Citation upon the first summons was found a sufficient interruption, tho' never followed out by any judicial act within the 40 years. Newbyth, 15th, Stair, 17th February 1665, Butter *contra* Gray. — And that even tho' the day of comparance fell without the 40 years. Gilmour, *Ibid.* — The like. Newbyth, 5th July 1665, Ainly *contra* Gladstones. Stair, Dirleton, 9th January 1675, M'Intosh *contra* Frazer. — The contrary had been found. Spotiswood, (*Prescription*) 25th July 1627 Rofs *contra* Elliot. — Serving and executing an inhibition against a debtor is a sufficient interruption of the prescription of a bond, which was the ground of that inhibition. Fountainhall, 15th February 1704, Johnston *contra* Kennedy. — The like, as to the prescription of an apprising. Forbes's MS. 19th November 1713, Dundas *contra* Murrays and Lieutenant General Douglas. — The like, in the vicennial prescription of holograph writs. Forbes's MS. 15th January 1714, Edmonston *contra* Edmonston.

FOUND, That a process of furthcoming, on a sum libelled in general, did not interrupt prescription *quoad* a particular bond, tho' this seems to contradict Justinian's decision. *l. 3, C. de annal. except.* yet it agrees with the tenor of our old act of parliament, and the Lords would not take upon them in this case to extend. Fountainhall, 16th February 1699, Menzies *contra* Forbes. — A general charge to enter heir, was not sustained as sufficient to interrupt the treennial prescription of an accmpt. Forbes, 16th, Fountainhall, 17th July 1708, Thomson *contra* Earl Linlithgow. — A summons interrupts not prescription, as to grounds not particularly libelled on. Stair, 11th February 1681, Kennoway *contra* Crawford. Forbes's MS. 2d February 1714, Rofs *contra* M'Kenzie and others. — The like. Falconer, 29th November 1683, Home *contra* Home. See Stair, 14th July 1669, Earl Marishal *contra* Leith. — A reduction and improbation being insisted in, in common form, to ascertain the pursuer's property to certain lands, it came out in the course of the process, that he was only superior, and that the defender was his feu-vassal; the Lords found the reduction and improbation a sufficient interruption of the negative prescription of the feu-duties, for *majori inest minus*, and a claim for the whole rents must be an interruption *quoad* any part. July 1730, Earl Marchmont *contra* Earl Home.

The right must be specially referred to, otherwise no interruption.

POSSESSING or pursuing upon the debt, whereupon inhibition is grounded, does not stop prescription of the inhibition, which can only be done by action upon the inhibition itself. Stair, 22d June 1681, Kennoway *contra* Crawford. Home, Falconer, 22d November 1682, Moultray *contra* Porteous. Marcus, (*Prescription*) 1st February 1684, Hepburn *contra* Brown.

PRESCRIPTION was found interrupted by a citation, tho' informal, the execution at the mercat cross not bearing the leaving or affixing of

What if the diligence be informal?

of a copy. Stair, 6th July 1671, M'Crae *contra* Lord M'Donald. The like. Stair, 25th November 1665, White *contra* Horn. Stair, 23d June 1681, Dunlop *contra* Porterfield. ---- A decret of poinding the ground against tenants, tho' lame, the proprietor not being called, was found sufficient to stop the negative prescription of the annualrent. Stair, 15th June 1666, Sinclair *contra* Ld. Houstoun. ---- Prescription of arrestment found interrupted by a decret in absence, pronounced by a Commissary beyond his instructions, and afterwards turned into a libel. Fountainhall, Forbes, 4th July 1706, Scot *contra* Bryden. ---- The like, in the vicennial prescription of holograph writs. Forbes, 20th, Fountainhall, 21st March 1707, Corbet *contra* Hamilton. ---- Found, That a citation at the mercat cross against tutors and curators could not be sustained as an interruption of prescription of inhibition, the execution against the principal party being amissing. Home, Falconer, 1st February 1684, Brown *contra* Hepburn.

Interruption
by partial pay-
ments.

INTERRUPTION of prescription of a bond being propounded on payment of annualrent, by the factor for the tutors of one of the obligant's representatives then a pupil; the Lords considering, that this was no constitution of a debt, but the preserving it against an odious prescription, thought that the factor's paying the annualrents (especially being a tract of several years payments) sufficient to interrupt, seeing the act of parliament requires only the taking a document to stop prescription. Fountainhall, 5th June 1696, Guthrie *contra* Nisbet.

Tho' payment, either of the principal or annualrent, does interrupt prescription of a bond, as to the principal sum, yet the annualrent being *annua præstatio*, every year does infer a distinct obligation, and every distinct year's annualrent does prescribe by 40 years silence; so that the payment of the subsequent annualrent, or a part of the principal, does not interrupt the prescription of any single bygone year's annualrent, if there was no pursuit upon that year's annualrent, during the course of prescription. Stair, Gosford, 7th February 1672, Blair *contra* Blair.

Interruption
by extrajudi-
cial demand.

A PARTY to whom a sum was due by bond, having written to the debtor, within the years of prescription, desiring him to take course with it; and the debtor returning answer by a letter, wherein he said, The claim was unknown to him, but desiring time to search amongst his papers, and advise with his friends what was fit to be done for satisfying the debt, and by a second letter craving delay; the Lords thought, That the limits of interruption ought to be fixed; and therefore repelled this, as not a legal and sufficient interruption. Fountainhall, Forbes, 4th July 1705, Lord and Lady Pitmedden *contra* Monro. *Nota*, In one of the letters the debtor seem'd, in civil terms, to deny, that ever there was such a debt, calling it a mystery. See *l. 3. c. de prescrip. 30 vel 40 Ann.* — Letters craving payment, writ to the defender within the three years, were found not to interrupt the prescription of an account of furnishing, the words of the act being express, "That such action cannot be pursued after three years, unless proved by writ or oath of party." 12th February 1737, Captain John Rutherford *contra* Sir James Campbell of Aberukle. — A debtor's promise to pay annualrent of his bond, found to be interruption, tho' payment was not made within 40 years. Marcus, (*Prescription*) February 1686, Skene *contra* Campbell. — And the triennial prescription of an account,

compt, was found interrupted by the debtor's missive letter, acknowledging, tho' but in general terms, the same to be due, so as to make a proof by witnesses, competent, of the quantities and prices. Forbes, 20th February 1708, Elliot *contra* Veitch. February 1730, Chalmers *contra* Ogilvie.

NEGATIVE prescription is saved as to the whole, the creditor doing diligence against any one of the principals or cautioners. Stair, Dirleton, 18th December 1667, Nicolson *contra* Ld. of Philorth. Forbes's MS. 23d February 1714, Earl Marchmont *contra* Home. — An infringement of annualrent reaching two tenements, diligence done against the one, or payment made by the debtor, saves prescription as to both; which was found, tho' the annualrent was constituted upon the two tenements by two different sasines. Stair, Gosford, 22d June 1671, Lord Balmerino *contra* Hamilton. — In a thirlage of *omnia grana crescentia*, established by writ, it was found, That the defender having grinded a part of his corns at the mill to which he was thirled, this was sufficient to sustain the astringion for the whole, tho' there was a desuetude for the rest above the space of 40 years. Durie, 26th June 1635, Ld. of Waughton *contra* Home. 25th July 1727, M'Cleod *contra* Vassals of Muiravenside. — In a declarator of thirlage, constituted by writ over the whole barony, which barony was now feued out to many vassals, found, That the decreets of abstraction against several of the heretors, were an interruption, even as to the heretors not contained in the decreets. Marcus, (*Multures*) 14th July 1688, Feuars of Gaitmilk-mill *contra* Feuars of Dunfermline. — A party claiming exemption from the jurisdiction of a regality, not having answered to the court for above the space of 40 years, but to the sheriff-court only; this answer was not sustained, *sciz.* That the jurisdiction being exercised as to others, it is preserved as to the whole. Stair, 23d November 1671, Rolland *contra* Ld. of Craigievar. See Stair, Gosford, 28th November 1676, Sheil *contra* Parishioners of Prestonhaugh.

Partial interruption, if it bars prescription as to the whole?

AN only son, who was nearest of kin to his father and to his mother, both now deceased, having, as executor to his mother, confirmed a decret for a sum of money, which had been recovered by her and her husband for his interest, and which confirmation was null, the subject being *in bonis* of the husband, as falling to him *jure mariti*; yet diligence done by the son upon this title against the debtor, was found sufficient to interrupt the negative prescription of the decret, he being at the same time, as said is, also nearest of kin to his father. Durie, 26th July 1637, Ld. Lawers *contra* Dunbars.

Interruption by an apparent heir.

Interruption of the positive Prescription.

IN an interruption of the positive prescription of a common pasture, it was argued, That the turning off of goods, which were presently put on again, was no sufficient interruption, seeing the party, notwithstanding, continued his possession; that there is necessary a legal interruption, by lawburrows or summons, or at least a complete and full *interruptio facti*, by debarring the party one whole year from any deed of commonty, which was repelled, and

Of servitudes.

the interruption sustained. Stair, 14th November 1662, Nicolson *contra* Lds. of Bightie and Balbirnie. — In a declarator of thirlage, founded upon a title in writ, and 40 years possession, found, That going to other mills sometimes, was no sufficient interruption, if the defenders came ordinarily to the pursuer's mill, and paid insucken mul-
 ture. Stair, 29th June 1665, Heretors of the mill of Keithick *contra* Feuars. — In like manner partial or clandestine abstraction, not sus-
 tained as an interruption, but going to other mills with their whole grist for one or more years together. Stair, 7th December 1677, Henderson *contra* Arnot. Stair, 11th January 1678, Lord Balmerino *contra* Cockburn. — In a competition betwixt two parties about a sal-
 mon fishing, neither having an absolute right, but obliged both to re-
 cur to prescription; their mutual interruptions, before their rights were
 completed, were found to have no effect, unless upon interruption the
 party interrupted had intermitted his possession. Stair, 13th January
 1680, Brown *contra* Town of Kirkcudbright. The like. Hope,
 (*Fishing*) 18th December 1623, Forbes *contra* Lady Monimusk.

Interruption
by the crown.

THE King having sent down a letter, touching the interruption of
 prescription of any part of his Majesty's right, the Lords found, That
 the publication of that letter at the mercat-cross of any sheriffdom,
 within which any party having interest dwells, without intending any
 action or giving citation, being published before the 13 years run out,
 appointed by the act 1617, to interrupt prescription against the King's
 right, should serve as effectually as if action had been intended against
 particular persons within that space, notwithstanding the said act re-
 quires intending a process within that time, which was found supplied
 by the said publication. Durie, 29th and 30th March 1630, the
 King and the Earl Monteith *contra*

Right of
precedency.

IN matters of precedency, protestations in parliament are a valid and
 effectual interruption. Fountainhall, Forbes, 23d January 1706, Earl
 Sutherland *contra* Earls of Crawford, Errol and Marischal.

Of teinds.

INHIBITION at a parish church-door sufficient to interrupt the po-
 sitive prescription of teinds. Stair, 25th January 1678, Duke of Lau-
 derdale *contra* Earl Tweeddale.

Interruption
by an apparent
heir.

REDUCTION and improbation of all rights affecting certain lands
 raised by one who was apparent heir in these lands, was found to in-
 terrupt the positive prescription pleaded for the defender, the pursuer
 being also served heir during the process within the years of prescrip-
 tion. Stair, 24th July 1672, Edington *contra* Home.

Prescription of Interruptions.

Interruption
by process falls
not in less than
40 years, un-
less limited by
statute.

A PROCESS once commenced does not fall in less than 40 years,
 unless where the time is shortened by particular statute; and therefore,
 after a process of declarator was raised, which lay over, and then ta-
 ken up again, the defender's answer was not found sufficient, That he
 a churchman had *decennalis & triennalis possessio*, since the commence-
 ment of the process. Stair, 28th June 1666, Ld. Philorth *contra*
 Lord

Lord Frazer. — The like found, with regard to a process of spuilzie, tho' it had lien over more than three years. Colvil, January 1586, Wood *contra* Ld. Pourie. Durie, 26th January 1622, Herring *contra* Ramsay. Durie, 4th March 1630, Lord Leslie *contra*. — The like, with regard to a process of compt and reckoning against tutors or curators, tho' it had lien over more than 10 years. December 1731, Creditors of Liberton *contra* his tutors and curators.

By act 9, parl. 1669, actions of forthcoming prescribe not in less than 10 years; and it is sufficient the first wakening be within the 10 years, provided it be renewed every five years. Fountainhall and Home, 3d, Falconer, 16th December 1684, Countess of Weemys *contra* M'Kenzie. — But this now settled otherwise by act 14, parl. 1685. — The price being arrested in a purchaser's hand, he deponed in the forthcoming, that he was debtor in a certain sum as the price of the lands, payable the first term after purging of incumberances. When the incumberances were purged, which was many years thereafter, the arrester raised a summons of wakening of his forthcoming, and insisted to have decreet. The condition in the defender's oath being now purified, the defence was, That the action upon the arrestment was prescribed. Answered, That till incumberances were purged the arrester was not *valens agere*. Replied, The law has said, "That all actions on arrestments shall prescribe, unless wakened every five years;" therefore, how fruitless soever the wakening might otherwise be, it was by the disposition of law requisite, in order to keep the arrestment alive. The Lords sustained the defence of prescription. 14th January 1726, Gray *contra* Murray.

THE act 10, parl. 1669, about the interruption of prescription, respects only the future time, and has no retrospect. Stair, 5th February 1680, Brown *contra* Hepburn. — This remedied by act 15, parl. 1685.

IN a declarator of precedency betwixt two Peers, the one founding on prescription, and the other opposing interruption by a citation; the Lords found, That the citation, tho' only for the first diet, was sufficient for an interruption; but found the said citation and summons fallen and extinct, because not renewed within seven years after the date of act 15, parl. 1685, which they found was not to be accounted from the date of its publication, and proclamation over the cross of Edinburgh, as the act 128, parl. 1581, appoints; because this new act expressly derogates from it, by declaring, That with respect to interruptions, the seven years shall commence from the date of the act. Fountainhall, Forbes, 23d January 1706, Earl of Sutherland *contra* Earls of Crawford, Errol and Marischal.

INTERRUPTION by executing an inhibition upon the ground of debt, falls not under act 10, parl. 1669. Fountainhall, 15th February 1704, Johnston *contra* Kennedy.

A REDUCTION upon the head of minority and lesion being raised and executed *intra quadriennium utile*, but allowed to ly over for above seven years; it was objected against a new summons of reduction upon the same head, That the ground of action was fallen by act 10, parl. 1669, which provides, That citations made use of for interruption,

tion, whether of real or personal rights, be renewed every seven years, otherwise to prescribe. Answered, *1mo*, The act does only relate to the long prescription. *2do*, The running of the *quadriennium utile* is not of the nature of a prescription. Minors have a privilege of being restored, provided they bring their challenge *intra quadriennium utile*; but if they once exercise their privilege by bringing a reduction, it must last for 40 years. The Lords found, That the act of parliament extends to all prescriptions, whether long or short, and that it does comprehend the pursuer's case, and therefore assilzied. Dalrymple, Fountainhall, 21st July 1699, Earl Forfar *contra* Marquis of Douglas.

A MAN's creditor becoming rebel, and the forfeiture gifted, the Lords sustained the interruption of prescription of the debt, by a citation at the rebel's instance before the forfeiture, tho' not renewed every seven years conform to the act of parliament; because the donatary of the forfeiture is not supposed to be master of the rebel's papers, or to know his rights or state of affairs. Home, February 1687, Graham *contra* Lin.

THE acts 1669 and 1685, requiring interruptions to be renewed, relate only to the case of citations; but where processes are further prosecuted to comparance and judicial acts, the same will make a sufficient interruption for 40 years, without necessity of being renewed. Dalrymple, 2d February 1705, Wilson *contra* Innes of Auchluncart.

PRESCRIPTION of bills. See Bill.

IF Compensation can be proponed upon a prescribed debt? See Compensation.

P R E S U M P T I O N .

Prefumed Alteration and Revocation.

Donatio inter virum & uxorem, by what deeds presumed revoked?

DONATIO *a viro facta uxori*, was not found revoked by a posterior general disposition made by him to another, because obligations and special legacies require special revocation to take them away. Fountainhall, 7th February 1699, Handiside *contra* Handiside. — A special assignation to a daughter, with a faculty reserved in favour of the disponent and his Lady, or either of them, to alter and dispose as they thought fit, was found revoked and conveyed to a second daughter, by a general disposition *omnium bonorum*, containing a restriction of the Lady to the provision in her contract of marriage, and a revocation of all additional rights in her favours, but no special revocation of the former assignation. Forbes, 17th February 1708, Hall *contra* Dame Margaret Campbell.

A MAN having granted to his wife an additional jointure and interestment in lands, and then a right of annualrent out of these lands to his daughter; the Lords found, That the additional jointure being *donatio inter virum & uxorem*, was revoked by the right of annualrent

pro

pro tanto, without prejudice to the relict of the superplus, the annu-
alright being satisfied. Dirleton, Stair, 15th December 1674,
Kinloch *contra* Rait. Haddington, 4th February 1607, Marjoribanks
contra Lady Mellerstains. --- But a posterior infestment of the same
lands was presumed a revocation, tho' not absolute, but in security;
only the sum for which the security was granted was equivalent to
the worth of the lands. Durie, 25th March 1635, Ld. Lawriston
contra Lady Dunipace.

POSTERIOR creditors have no power to challenge or revoke a do-
nation granted by their debtor to his wife, if at his death he left suffi-
cient effects to pay all his debts. Marcus, (*Stante Matrimonio*) 1st
December 1681, Creditors of Lord Coupar *contra* his relict. Auchin-
leck, (*Husband*) 21st July 1631, Lady Huttonhall *contra* Cranstons.
— A donatar of escheat found entitled to revoke a donation granted
by the rebel to his wife before his rebellion, the rebel having died in-
solvent. Marcus, (*Escheat*) March 1683, Marquis of Montrose
contra Buchanan's relict. — A donation *mortis causa* cannot be taken
away by the subsequent escheat of the granter. Colvil, 1586,
Seaton *contra* Seaton.

A SPECIAL donation *mortis causa* not found revoked by a testa-
ment, mentioning goods and gear in general, which was interpreted
to be only such as were not disposed. Durie, 8th March 1626, Tra-
quair *contra* Bluschiels. *Donatio mortis causa.*

A BOND of provision undelivered was found effectual, and that it
was not revoked by a general assignation in favours of another child,
of the granter's whole moveables, goods and gear. Forbes, 16th De-
cember 1712, Monro *contra* Monro. *Bond of pro-
vision undeli-
vered.*

A PARTY taking bond for a sum, wherein he substitutes two of
his five children in the fee, and some years thereafter making his tes-
tament, wherein he appoints his whole means to be equally distri-
buted among all his children; the Lords found, That this testament
did not derogate from the prior substitution. Fountainhall, 24th No-
vember 1710, Johnston *contra* Callander. — Alexander Farquharson,
in his latter-will and testament, appointed his wife executrix and uni-
versal legatrix of his haill goods, gear, moveable debts, sums of money,
&c. At that time he was creditor in a bond for 2000 merks payable to
himself, and failzieing of him by decease, to his only lawful son John
Farquharson, their heirs, executors or assignies. The question occur-
red, who had right to this bond; the wife in virtue of her universal
legacy, or the son in virtue of the special destination in his favours.
The Lords found the universal legacy did not derogate from the special
destination. 7th July 1732. Strachan *contra* Farquharson. *Substitution
by what deeds
presumed al-
tered?*

A PROVISION to the wife of half the moveables, was not found to
exclude the heir from drawing heirship moveables out of that half.
Fountainhall, 12th November 1680, Stevenson *contra* Sir John Paul.
— A relict being provided by her contract of marriage to a share of
the household plenishing; in a pursuit against her husband's representa-
tives, it was found, That this being a disposition *inter vivos*, the heir-
ship *Heirship, if
presumed in-
cluded in a ge-
neral dispositi-
on of move-
ables?*

ship moveables are included. 12th July 1734, Lady Kinfauns *contra* Mrs. Lyon. 18th November 1737, Boswell *contra* Boswell.

A grant containing a power to alter.

A FATHER having assigned to his daughter a bond, reserving a power to alter, did, thereafter, assign the same bond to a third party, taking backbond, bearing, *The assignation to be in trust, to this effect only, that diligence might be done thereupon*; and, by the backbond, the third party was bound to denude in favours of the cedent, his heirs and assignies. The Lords found there was no design to alter, it being mentioned in the backbond, That the second assignation was in order to do diligence, and for no other end. Gilmour, January 1665, Stair, 14th July 1667, Scot *contra* Scot. — A creditor in a bond including executors, assigning the same to a person, his heirs and assignies, but taking a backbond, declaring the assignation to be a trust in order to do diligence; this was found not to presume any alteration of will, nor to make the bond moveable. 3d July 1735, Monro *contra* Monro. — A disposition bearing a power of alteration, being delivered to the disponent, it was found sufficient to infer an alteration, that the writ was thereafter seen in the disponent's hand; for it was thought, That the very having of the writ, did presume that he had called for it through an alteration of will, unless the disponent would offer to prove, that it came into his hands upon some other view. It was alledged here, That the disposition was afterwards returned to the disponent, which the Lords would not determine upon, but before answer ordained him to condescend how he came by it. Stair, Dirleton, 14th November 1667, Henderson *contra* Henderson. — A father on death-bed having granted an assignation, in favours of his son, of a particular sum, with a reserved power to alter, did, thereafter, name his son and his daughter executors and universal legataries; the son claimed both upon the assignation and upon the testament: It was answered, That the testament imported a revocation of the assignation. The Lords found the assignation effectual, and not derogated from by the universal legacy, seeing there were moveable goods and sums, besides the assignation. Stair, 29th January 1679, Aitkman *contra* Heirs of David Boid.

Deed of entail, upon what circumstances presumed altered?

A MAN being infeft by resignation upon a tailzie, and taking thereafter new infeftment, simply, and without mention of any tailzie, was found thereby presumed to have broken the first tailzie. Maitland, 11th January and 10th February 1569, Maxton *contra* Maxton. — Tearing away the fidescription from the joining of the first and second sheets of a tailzie, was not found to annul the tailzie, altho' the obligation to resign, the procuratory of resignation, and lands, were contained in the first sheet; because fidescribing is not an indispensable solemnity in private voluntary rights, as it is in decreets, inhibitions, and other diligences; and further, the maker of the tailzie considered it as valid, notwithstanding the fidescription was torn off, by some days thereafter signing a revocation thereof, except as to a particular effect, for which he declared it was to subsist. Dalrymple, 31st December 1707, Forbes, 23d January 1708, Livingston *contra* Menzies and Livingston.

Payment

Payment when presumed ?

A TACKSMAN having, at the issue of his tack, paid up his whole rent, did, thereafter, intent process against the setter for the publick burdens paid by him during the currency of his tack, and which the setter was bound to relieve him of, and produced the receipts of the publick burdens; in this case it was presumed, that these receipts were compted upon and allowed in the rent, tho' not specified in any of the discharges granted to the tacksman for his rent, unless the tacksman would instruct by writ, or the setter's oath, that these receipts were not allowed. Stair, 2d December 1664, Veitch *contra* Paterfon. — A creditor granting a bond for a greater sum to his debtor, this will not infer a presumption, the former debt was compted upon and taken away. Haddington, 16th January 1611, Carnowa *contra* Stewart. — One who was creditor in an accompt, having granted bond to his debtor for a greater sum; it was urged as a presumption, that the accompt was reckoned upon at granting the bond; which was not found, unless the bond had bore to be after compt and reckoning. Stair, 17th June 1665, Murray *contra* . — Found, That a bond bearing borrowed money, granted by a writer or agent to his constituent, does not infer that the agent has got payment of all his preceeding accompts; only he was ordained to depone, that the accompt was still resting. Gosford, 14th December 1675, Somervell *contra* Executors of Muirhead. — An appriser having got from his debtor a bond for the precise sum in the comprising, the defence, that it must be presumed to have been given in satisfaction, was repelled. Fountainhall, 24th July 1678, Ld. Ardblair *contra* Husband. — The purchaser of lands, who stood debtor to the seller, by bond, for the price, having, by the seller's order, paid to his creditors some debts affecting the purchase, and taking receipts of the money as received from the seller, and afterwards having got from the seller himself a discharge of a greater sum; but having proved by witnesses, That he actually paid money, or gave security to the creditors in lieu of their receipts: The Lords found, That these receipts, produced by him at discussing a suspension of a charge on the bond, were not in the case of the 25th act, parl. 1696, touching trust, nor presumed to have been included in the discharge granted by the charger to the suspender; and therefore allowed them as separate articles of payment of the debt in the bond, unless the charger could prove by the suspender's oath, that they were included in the said discharge. Forbes's MS. 10th December 1713, Halyburton *contra* Cook. — The balance of a first accompt betwixt merchants, being carried to the second, and the balance of the second to a third accompt, and that third being signed by both parties; the Lords found, That this did fit and close, not only that third accompt, but the two former ones, and that it was presumed the instructions were given up by the compt, unless it were proved by writ or oath, That the accompts were fitted upon trust, or that, notwithstanding the fitting them, the instructions were left with the compt. Home, January 1684, Seaton *contra* Cockburn.

That articles claimed have been compted upon and cleared.

Apocha trium annorum. And 1^{mo}, A presumption only.

2^{do}, Ob- tains even where a separate document is taken for the rent.

3^{tio}, Must be three separate consecutive discharges.

4^{to}, The discharges must be in writ.

5^{to}, Extends only to duties of the same kind with these contained in the discharges.

6^{to}, Where the discharges are not all granted, by, or to the same person.

THE liberation founded upon an *apocha trium annorum* is but presumptive, admitting contrary probation. Stair, 18th February 1669, Cockburn *contra* Stewart.

FOUND, That the *apocha trium annorum* is a sufficient discharge of all bygones, even where some of these bygones were constituted by writ. N. B. The writ here was not a bond for a liquid sum of money, but a note only, whereby the debtor became bound "To make just compt, reckoning, and payment of his bygone feu and teind-duties, and of what he was resting thereof since his last discharge," tho' it was pled, that this made no difference, because, if ever these bygones had been compted upon, the said note would have been given up to the debtor. 18th July 1728, Marquis of Annandale *contra* Johnston of Elshiehiels. — The like. Durie, 18th March 1634, Douglas *contra* Bothwell.

ONE discharge for three terms, found not sufficient to assilzie from bygones, but three acquittances for three terms. Maitland, 23d February 1554, Executors of George Forrester *contra* Ld. of Dreddon. Haddington, 26th March 1622, Kennedy *contra* Dalrymple. — The contrary. Haddington, 14th February 1612, Ld. Wedderburn *contra* Nisbet. Hope, (Payment) Weemy's *contra* Lady St. Collumbs. — Two years discharges with partial receipts for the third, which, put together, wanted some small thing of that year, were not found sufficient to infer this presumption, tho' the balance was offered at the bar. Durie, 23d March 1631, Ld. Rosyth *contra* Wood.

A TENANT referring the payment of three consecutive terms to his master's oath, who acknowledged the receipt of three terms rent, this was found not to be a liberation, because the master did not acknowledge, that they were three consecutive terms. Haddington, 26th March 1622, Kennedy *contra* Dalrymple of Stair. To found this presumption writ is required; and it is not sufficient that the defender is willing to refer the payment to the pursuer's oath, for then he may adject in his said oath, That he received the said payments, without prejudice of preceeding years. Durie, 19th February 1631, Ld. Moristoun *contra* Tenants of East-Nisbet.

A PERSON pursued for the rent of many years, excepting upon the three last years discharges; this was found not to elide any other grafsums or duties of the lands than were expressly contained in the discharges. Haddington, 16th July 1605, Lady Errol *contra* Cruikshank.

THREE consecutive discharges by the same person, tho' granted to two different parties, viz. Two to the father and one to the son, were found sufficient to liberate from all bygones. Durie, 17th February 1631, Williamson *contra* Ld. Balgillo. — A person pursued for many years farms, excepting upon the three last years discharges; this was found a good defence for all bygones that might have been owing by himself, but not for bygones alledged owing by his father or predecessors. Haddington, 16th July 1605, Lady Errol *contra* Cruikshanks. — Three consecutive discharges being granted to the same person, but not by the same person, two of them being granted by the father, and the third by the son; the Lords inclined not to conjoin the son's discharge with the father's, to infer the presumption, that preceedings were paid, unless the son's knowledge of the father's discharges were qualified, and, before answer, ordained the son and his late tutor to be examined

examined if they saw, or knew of the said former discharges. Dalrymple, 8th December 1699, Gray *contra* Reid.

TENANTS producing merchants receipts for three consecutive years farms, delivered by order of their master, does not import a discharge of a decret for the rents of preceeding years. Durie, 26th March 1636, Master of Corstorphin *contra* Tenants. — A discharge granted by him who, as factor or chamberlain to a baron, was in use to receive all the duties of the barony, found sufficient to assilzie the feuar who paid his duty to him. Haddington, 14th February 1612, Ld. Wedderburn *contra* Nisbet. — On the contrary, found, That factors discharges are not sufficient to found this presumption. Stair, 27th July 1667, Preston *contra* Scot. — In a process at the instance of a person of quality against a tenant, the Lords found, That three subsequent discharges, granted by the chamberlain, did not liberate the tenants from preceeding years, but only from the years mentioned in the discharges, the person of quality being sequestred for the time, and not *valens agere*. Home, February 1682, Earl Marischal *contra* Fraser of Strichan.

7mo, Where the discharges are granted by a third party, to whom the rent is made payable.

THREE consecutive sasines found sufficient to assilzie a vassal in a process of nonentry. Balfour, (Nonentry) 21st March 1564, Ld. Leithington *contra* Lord Yester.

8vo, Three consecutive sasines liberates from bygone nonentries.

Two years discharges of any of the King's servants fees infer the presumption, That all bygones were paid. Haddington, 2d February 1610, Sir Robert Melvil *contra* Stewart.

9mo, Two consecutive discharges of a servant's fees.

A DEBITOR in a bond bearing annualrent, compting with his creditor, alledged, that several years before, he had paid the annualrent of one year twice over, which he offered to instruct by one general discharge of that year's annualrent, and several partial receipts of the same year. The creditor pleaded the *apocha trium annorum*. He put the case, That he were now insisting against his debtor for some old remains of annualrent, his three last discharges would be objected to him, and he contended, that a creditor is rather better founded, who argues from three consecutive payments made by the debtor, that all former scores are cleared betwixt them, and that in this case either there never was super-payment, (the general discharge likely having come in place of the partial receipts) or if there was, that it has been reckoned upon in some of the following discharges. The defence of *Apocha trium annorum* was sustained to the creditor. 5th February 1729, Sir Alexander Reid *contra* Ogilvie.

10mo, The presumption takes place in favours of creditors.

A PARTY having dispoed his estate to his son in the son's contract of marriage, and one double being only writ, which he kept in his custody till death, the Lords found, That it was not to be considered as *instrumentum penes debitorem repertum*, being a mutual evident. Dirleton, 16th January 1677, Stewart *contra* Riddoch.

Chirographum apud debitorem repertum. And, 1mo, Mutual contract.

A PRINCIPAL bond, with an assignation thereof in favours of a third party, having been both in the debtor's hands after the creditor's decease; this was found an extinction of the bond, pleaded in a competition of creditors against the assigney: For it was equally an extinction, whether the cedent or assigney delivered these writs to the debtor, and being once extinguished, the debtor could not revive the debt by the delivering the writs to the assigney, in prejudice of his other creditors. Forbes, 26th January 1710, Simpson *contra* Rollo.

2do, Chirographum in the principal debtor's hands.

3^{to}, In the
cautioner's
hands.

IN an exhibition of a bond against the cautioner therein, the Lords found, That *eo momento* that he was pursued as haver, it did liberate him, *quia instrumentum apud debitorem repertum præsumitur solutum*, unless the pursuer would offer to prove *quod dolo defuit possidere*. Spotiswood, (*Exhibition*) Goodman of Monkton *contra* Carmichael. — A bond granted to a defunct being amissing, and thereafter being understood to be in the custody not of the principal, but of the cautioner unregistred, and without any assignation thereto; in an exhibition thereof the Lords assilzied the cautioner's heirs, upon the defence of their having the bond retired, it being supported by a memorandum on the back of the bond, written by the cautioner himself, and bearing both the time and manner of payment, and a fitted accompt under a third party's hand relative thereto. Fountainhall, 5th February 1703, Gordon *contra* Johnstons.

4^{to}, Where
the debtor is
doer for the
creditor.

A WOMAN's own agent having borrowed a sum from her, and granted bond for it; but she missing the bond, and pursuing him upon oath; and he appearing, producing the bond, and alledging upon the known rule, *Chirographum apud debitorem repertum, &c.* the Lords considered, that he was an agent about the session, and was trusted by this ignorant woman, and therefore ordained him, before he should depone, to give in a condescendence who it was that brought the bond to him, to whom he paid the money, who were present, and in what place, with the other circumstances, to try what appearance of probability his relation had, before he should come to depone. Fountainhall, 4th January 1710, Burgh and Jenkins *contra* Scot. — A party having taken assignation to a debt, but giving his backbond, declaring it was in trust; and at his death the backbond being found cancelled among his papers, and yet there being an article in his accompt-book, bearing, That the said sum, after deducting expences, belonged to the pursuer; the Lords, in a process against his children, wherein the pursuer not only founded on the said article, but on the said retired backbond, (which it was alledged might have come into the defunct's hands many other ways than by delivery, he having been the pursuer's tutor, &c.) found, That it was originally a trust, but that the same was fully discharged and taken off, by his retiring and cancelling the backbond. Fountainhall, 7th June 1712, Charteris *contra* Charteris.

5^{to}, Two do-
cuments, and
one retired.

A PARTY having granted bond of provision to his daughter, and his son thereafter granting a bond of corroboration; in a process against the son's son for payment, he alledging, That the original bond was retired and in his hands, and so was *chirographum apud debitorem repertum, quod præsumitur solutum, &c.* the Lords found, That this being but a presumptive payment, it could not take place, where the bond of corroboration was not likewise retired. Fountainhall, 28th June 1700, M'Gowan *contra* Skelmoorly. — The like. Fountainhall, 21st January 1702, Brown *contra* Henderson.

6^{to}, Bond
delivered to be
a fund of cre-
dit.

A BOND for a certain sum, subscribed by a principal and cautioner, blank in the creditor's name, being left in the hands of the principal debtor, to be a fund of credit to him, as his occasions should require, and delivered by him after the term of payment to his own creditor, for security of what he owed him; the Lords found the receiver not liable to exhibit the same, as *instrumentum penes debitorem repertum*, in a process of exhibition at the cautioner's instance. Forbes, 7th July 1708, Lord Salton *contra* Elphinston.

A PRIN-

A PRINCIPAL heretable bond unregifted, upon which infestment ^{7mo, Debt} had passed, being in the debtor's hands after the creditor's decease, ^{secured by in-} with the principal sasine upon it; the Lords sustained the defence ^{festment.} *instrumentum apud debitorem repertum*, notwithstanding there was an assignation of the same in favours of a third party, but which was also in the debtor's hands, with the bond and sasine. Dalrymple, Forbes, 26th January 1710, Simpson *contra* Rollo. — In a declarator of trust of an apprising, that it was for the debtor's behoof, the Lords refused this adminicle, *viz.* That the apprising, with the charter and sasine, were lying beside the debtor in his charter-chest, and so was presumed *instrumentum apud debitorem repertum*; which they found did not hold in real rights, because these the debtor might extract from the register; and, in general, the Lords declared, That they would not take away heretable rights by presumptions and conjectures. Fountainhall, 12th January 1686, Learmonth of Balcomie *contra* Mr. William Gordon.

A RELICT pursuing her husband's heirs for implement of her ^{Tocher si-} contract of marriage; it was objected, That she had not performed ^{pulated by a} her part which she had bound herself in by the contract. The Lords, ^{wife in her} before answer, ordained the pursuer to condescend by witnesses, or o- ^{contract of} therways, how she would prove, That at the time of the marriage she ^{marriage,} had the effects mentioned in the contract; and found it not presumed, ^{when presumi-} that she had performed her part of the contract. Stair, 26th July 1665, ^{ed paid?} Brotherstones *contra* Ogle. — A husband being obliged to imploy the tocher, upon payment of it, the wife being the only contracter, she was found to have right to no liferent of her tocher, till she should prove payment. Stair, Gosford, 11th December 1672, Calderwood *contra* Cunningham. — A first husband's executor pursuing the wife and her second husband for the tocher; the Lords found, in regard the wife was only party contracter for herself, without any burden taken for her, and that the first marriage subsisted 11 years, that the tocher was presumed to be paid, or that the husband had got as much of the wife's means as did amount to the sum pursued for. Falconer, 21st December 1682. Home, March 1683, Scotland *contra* Reid, — One named executor and universal legatar by his defunct wife to a considerable separate subject that was her own property, being sued for a legacy left by her, pleaded, by way of defence, That he was creditor to the defunct in the tocher contracted by her, which must be paid before any legacy, and which he had forbore to demand payment of, tho' they had lived seven or eight years together, in hopes of his being his wife's heir; and he was willing to make faith the tocher remained unpaid at her death; the Lords sustained the defence, he giving his oath. Marcus, (*Contracts of Marriage*) March 1685, Colterallers *contra* Weirs. — The Lords found, That there is a great difference betwixt an obligation by a woman in her contract of marriage, to pay a sum of money in name of tocher, and her being obliged to enter her husband to the possession of goods and gear, extending to a sum named; for, in the first case, they found, That the parties having lived long together, altho' the wife had gotten no discharge, it was not sufficient to prejudice her of her liferent; but in the other case, the affirming that she had goods and gear to a certain value; and it being offered to be proved, that they were evicted from her, it was found, That she ought

to condescend and prove that she had goods of her own to the extent of the sum named in the contract. Gosford, 6th June 1674, Law *contra* Muir.

Honoraries
presum'd paid.

A PHYSICIAN having an honorary employment, and not using to give receipts for what he gets from patients, hath no action against a defunct patient's representatives for any fee on account of his attendance, unless he can prove a promise or paction. Bruce, 25th and 31st July 1716, Johnston *contra* Bell. — In a process at a physician's instance against the representatives of his defunct patient for his attendance and advice during the course of several years, the Lords sustained process for his attendance during the death-bed sickness only, which they found could not be extended beyond 60 days, and if the disease was of a longer continuance, that the presumption of satisfaction must in so far take place. Dalrymple, 7th February 1717, Dr. Russel *contra* Sir James Dunbar. — A pension of 40 merks *per annum* being established by an act of a town council in favours of an advocate, a process for payment was raised against the present magistrates by his representative; the defence was, Lawyers and physicians honoraries are presum'd to be constantly paid, neither is it usual to report discharges in cases of this nature, which the Lords repelled. 26th December 1728, M'Kenzie *contra* Town of Burntisland.

One employed as a
hand, presum-
ed to have
accompted.

A SERVANT entrusted with retailing small wares, being pursued several months after quitting the service for the money received for a year back, is presumed to have accompted, and to have paid in to the master the money from time to time, and no proof to the contrary can be admitted but writ or oath of party, tho' the quantity and value of the goods might be proved by witnesses. Durie, 21st January 1636, Coutts *contra* Coutts. — One who had been a domestick servant, being pursued for his intromissions with rents, corns, &c. which were offered to be proved by witnesses; it was found, That the defender having intromitted by his lady's command from time to time, and she having paid his fees, and dismissed him without quarrel, it must be presum'd that he made compt, which was found relevant to affoilzie him. Stair, 25th November 1671, Irvine *contra* Falconer. — The like. February 1730, Morison *contra* Bruce. — A son *in familia* being in use, by his father's directions, to intromet with and uplift subjects belonging to him, was pursued, after his father's death, by the heir, to accompt for his intromissions; the defender contended, That he was only his father's hand, that he acted without a commission in writ, and what subjects he intromitted with, he delivered to his father without any receipt; the Lords refused to sustain process, unless the pursuer would offer to prove resting owing by the defender's oath. July 1722, Lord Salton *contra* Fraser.

Donatio non præsumitur.

Aliment be-
stowed with-
out paction,
when paction
might have
been presumed
a donation.

ONE having continued many years to aliment a grandchild by his daughter, born in his house; it was presumed to be done *animo donandi*, never having desired the father to take home his child, nor demanded a promise of payment. Stair, 21st July 1665, Ld. of Ludquhairn *contra*

tra Ld. of Gight. — In a pursuit against a party for the aliment of his child, the Lords found this defence relevant, That the pursuer and his wife having kept their own grandchild, the defender's daughter, in family with them, it was presumed to be *ex pietate parentali*; so that there was nothing due for her aliment, except there had been a paction to the contrary. Fountainhall, Stair, 11th June 1680, Gordon *contra* Leslie. — The Lords found nothing due for aliment of a boy, in regard there was no paction thereanent, the entertainer being the boy's uncle. Fountainhall, 15th January 1703, Chisholm *contra* Steedman. — A party having taken his sister's son from her, when the father was abroad in a voyage, and entertained him seven years at his house, without any previous paction; the Lords found, That the party had right to claim payment for the boy's aliment from the father. Forbes, 18th November 1707, *inter eosdem*. — Children who had ample alimentary provisions settled upon them by their grandfather upon the mother's side, were occasionally with him at the time of his death, and continued in family with their grandmother, his relict, for about a year thereafter, when they returned home to their father; the grandmother's executor craving this year's entertainment out of the children's funds; the presumption was founded upon by the children, That their grandmother, being in opulent circumstances, she furnished the aliment out of affection, not interest; the Lords found no aliment due. 30th July 1734, Countess of Weemyss *contra* her Children.

THE Lords found, That where a near relation stays a considerable time in family with another, and both are majors, so that they may make bargain, if they intend the one should have a fee from the other, or the other have allowance for aliment; if they make no such agreement, neither can the one crave a fee, nor the other any allowance for alimenter, it being presumed, That the one did service on account of the relation for his entertainment; and that the other did entertain him in contemplation of that relation, and that he was useful. Dirleton, Gosford, 6th June 1676, Rig *contra* Rig.

THE Lords sustained aliment to a minor without paction, tho' the minor had a father living in the same town, with whom the entertainer might validly have pactioned; but here the entertainer was debtor to the minor's father, and so it was chiefly urged, That *debitor non presumitur donare*. Fountainhall, 15th February 1701, Wilson *contra* Archibald. — Found, That a mother might crave allowance for alimentering her daughter come to years, tho' without paction, upon this ground, That she was debtor to her daughter. Harcus, (*Aliment*) January 1683, Alcorn *contra* Charteris.

A MAJOR, even without paction, was found liable for his aliment to a person, who usually alimentered for money. Dalrymple, Bruce, 23d June 1715, Forret *contra* Representatives of Carstairs.

THE entertainment of any person after pupillarity, without agreement, is presumed to be freely gifted, and infers no obligation, whatever means the party entertained have; but a step-father, or stranger entertaining persons, within pupillarity, is not presumed to gift, but the party alimentered is liable *secundum valorem*; otherways, with respect to a mother entertaining her children without any agreement, which is presumed to be *ex pietate materna* by free donation, if the children have no considerable estate. Stair, Gosford, 2d February 1672, Guth-

But where there could be no opportunity of a paction, donation is presumed or not, according to circumstances.

ry *contra* Ld. of M'Kerfoun. Stair, 25th June 1664, Melvil *contra* Fergusson. — A minor's mother pursuing the tutor for several years aliment; altho' the minor, during these years, had nothing of his own, because of a grandmother liferenter, then alive; yet, after her death, the minor having come to his own, action was sustained to the mother entertainer, for all the preceeding years. Spotiswood, (*Minor*) 3d February 1624, Lady Mongreenan *contra* Ld. Blair. — An estate being intricate and litigious, the Lords, in a process at the instance of the grandmother against her grandchild for the expences of 13 years aliment she had bestowed upon her, decerned for the tenth part of the sum that the said estate was judged to be worth; but if, *in eventu*, the grandchild did not recover the estate, declared, That she should not be liable personally, the grandmother, in that case, being presumed to have alimented *ex pietate*. Dirleton, 13th June 1672; Lady Lugton *contra* Hepburn and Crichton.

In a contract of marriage, the estate being provided to heirs male, with a provision of 6000 merks to an only daughter, payable at her marriage; the mother, who alimented the daughter, the only child of the marriage, was found to have a good action against the heir male who succeeded to the estate as representing the defunct, who was liable to aliment his daughter; and here the *pietas materna* had no weight, where the question was with extraneous heirs. Gilmour, January 1663, Stirling *contra* Ld. Otter — The like. Stair, 7th July 1675, Wilkie *contra* Morison, where a mother having alimented her son, an infant, until his death, was found to have action against extraneous heirs, tho' she liferented his whole effects. — A woman who had a very small jointure, having entertained her son for several years, paid his apprentice-fee, and the charges of his funerals, he having died minor; in a pursuit at her assigney's instance against her son's heir, who was only his cousin, the Lords found, That the presumption of entertaining *gratis* ceased here. Fountainhall, 17th November 1697, Gourlay *contra* Urquhart.

THE Lords allowed aliment, tho' without paction, bestowed upon a woman, now 40 years old, in respect it was begun in her minority, and continued till that age. Fountainhall, Stair, 16th February 1681, Spence *contra* Fowles.

A CREDITOR in an heretable bond of L. 8000 Scots, assigned the same to his debtor's daughter *in familia* with her father, the father having died bankrupt; in a competition betwixt the young lady and the personal creditors of the defunct, she was ranked, not only for her principal sum, but also for her bygone annualrents, which were found due, notwithstanding of the aliment bestowed upon her by her father in her minority; and the maxim, *Debitor non præsumitur donare*, was not found to take place, in respect, 1mo, The bond did not come from the father. 2do, The *pietas paterna*. 3tio, That in his accompts, or any other way, he never expressed an intention to aliment her out of these annualrents. February 1731, Creditors of Kimmerghame *contra* Hume. — A father becoming debtor to his minor children, by uplifting a bond left to them, his heir being sued for payment, was absolved from the annualrents of these years, during which the children continued in their father's family, it being presumed that the annualrent of their own stock was applied *pro tanto* towards their aliment and education, *quia debitor non præsumitur donare*. Stair, 15th Gofford,

ford, 16th December 1668, Winram *contra* Eleis. Gosford, 13th July 1669, Maxwell *contra* Brown.

A BOND of provision, tho' retained in the father's hands and power during his life, found to be taken away by a posterior provision, granted to the child, equivalent to the sum contained in the bond of provision. Durie, 13th November 1624, Wallace *contra* Wallace of Ellerslie. --- In a pursuit upon a bond granted by a father, obliging himself to infeft a younger son in certain lands, and lying by his father the time of his decease; the Lords found the bond not taken away or implemented by the father's disposing other lands to the son of a much greater extent, seeing the disposition did not bear to be in satisfaction of the prior bond. Durie, 20th February 1639, Lord Cardross *contra* Earl Mar. --- A man executing a bond to his natural son for a sum, but retaining it in his own power, and thereafter infefting him in a yearly annualrent, redeemable for the very same sum contained in the first bond, the Lords found, That seeing the posterior security (tho' redeemed by the father in his own lifetime) made no mention of the former, they both might stand together, and that the redemption of the posterior took not away the first. Durie, 24th July 1623, Stewart *contra* Fleming. --- A testator having legated a sum to his sister, and burdened his executor therewith; and having, two years thereafter, given her an assignation to a sum, precisely the same in quantity, lying in a third party's hands; the Lords found, That, tho' it was the same testator, the same legatary, and the same sum; yet, the last having no relation to the first, they were both due, and the last did not come in place of the first, nor absorb it. Fountainhall, 20th June 1704, Stirling *contra* Deans. --- A relict having paid a debt due by her husband, and taken a discharge thereof, but not an assignation, being at the time neither executrix to her husband, nor tutrix to her children; was presumed to have done it on purpose to relieve her children; and the Lords therefore refused to sustain it as an article of charge in a compt and reckoning with her children. Stair, 14th November 1661, Fleming *contra* her children.

Deeds in favour of children or near relations, if presumed in satisfaction of former revocable settlements?

LEGITIM is never presumed to be paid from, unless expressly discharged. Stair, 14th February 1677, Duke of Buccleugh *contra* Earl Tweddale. --- And therefore a child was not excluded from his legitim, tho' he had a bond of provision, since it did not bear to be in satisfaction of the legitim. Stair, 16th July 1678, Murray *contra* Murray. --- The like. Spotiswood, (*Forisfiliation*) 24th February 1627, Ross *contra* Lillie. --- Provisions to children in their father's contract of marriage not imputable in the legitim, because the legitim is no such debt as to make the maxim applicable, *Debitor non presumitur donare*; besides, that the *pietas paterna* is the more prevailing presumption. Home, 18th January 1726, Nisbets *contra* Nisbet. --- A right to money and other moveables made by a husband to his wife, is not presumed imputable in her legal third. Home, December 1720, Lieutenant Graham *contra* Lady Balmain, adjected to the decision, 18th January 1726, Nisbets *contra* Nisbet of Dirleton.

If presumed in satisfaction of the wife or children's legal claims?

A MAN having contracted a sum with his daughter, and after her decease having disposed his estate to his son, with the burden of a sum

If presumed in satisfaction of debt?

to be paid to her children, which was precisely the sum he had contracted in her contract of marriage, yet did not mention the said contract; the Lords refused to decern for payment of both sums, and found, That the contract and disposition bore but one and the same sum. But the pursuer having craved, that the writer, witnesses, communiſers, &c. might be examined, to clear what was the grandfather's design, the Lords complied therewith. Home, December 1683, *Innes contra Jamison*. — A party in his contract of a second marriage having provided a certain sum to the children thereof, and long thereafter giving a bond of provision to the only child that existed of that marriage; the Lords, in a reduction of an adjudication led for both the sums, found, That the last bond was in implement of the contract of marriage, and that they were not both due, and therefore restricted the adjudication to one of the sums and its annualrents. Fountainhall, 25th June 1706, *Davidson contra Rendal*. — One having, anno 1667, granted a bond for 3000 merks to his youngest daughter, an infant, payable at Whitsunday 1680, bearing in satisfaction of all she could claim at his death; and in the year 1677 another bond for 4000 merks, payable at Martinmas 1677, bearing also to be in satisfaction of all she could claim at his death, "except what he should please of his own accord to leave her;" it was found, That the daughters had no right to pursue for the first bond, as being innovated by and comprehended in the second. Forbes, 24th February 1709, *Burnet contra Maitland of Pittrichie*. — A relict, executrix to her husband, and thereby debtor to her children in their provisions constituted by the defunct, lent out a sum of money, in the name of two of these children, only payable to herself in liferent, with a substitution of one of these children to the other, failing heirs of their own body; and failing all these, to the mother herself and her heirs. In this case, the bond was found to be in satisfaction of the bairns portions *pro tanto*, and a donation *pro reliquo*, tho' it was argued, That parents, bestowing sums for the use of their bairns, are presumed, from natural affection, to do it *animo donandi*, and not to satisfy former provisions, unless so express'd: And here the bond was not simple, but bearing a clause of a liferent, and of a return to the mother herself, which were incompatible with an intention of satisfaction. Stair, 19th November 1661, *Fleming contra Gibson*. — A son having pursued his mother as executor to his father, her defence was, That she acquired a comprising in the pursuer's name by her own means, which should be imputed in satisfaction, seeing *debitor non præsumitur donare*, and the pursuer made use of and assigned the apprising; the Lords sustained the defence for the mother, tho' the pursuer contended, That it was presumable she acquired the apprising in his name *ex pietate materna*. Marcus, (*Executry*) February 1683, *Schaw contra Straiton*. — Dr. Robertson, in his nephew Archibald's contract of marriage, became bound to provide and secure at the first term after his death the sum of L. 300 Sterling to the said Archibald and his future spouse, &c. thereafter the doctor secured the sum of 6000 merks upon the estate of Bedlormie, by an heretable bond and infestment, which he took to himself and heirs whatsoever. The said Archibald succeeding to these subjects as heir whatsoever, the defunct having left no heirs of his own body, insisted against the executors for payment of the said L. 300 stipulated to him by his uncle in his contract of marriage; the defence was, That

Dr.

Dr. Robertson had implemented this obligation by securing L. 300 to the pursuer upon the estate of Bedlormie, which has devolved upon him. Answered, When the doctor took the forementioned subject to himself and his heirs whatsoever, he had certainly no intention of implementing the obligation which he bound himself in, to his nephew; at that time he had the expectation of nearer heirs, and questionless had it in his view that those subjects might be inherited by his own children, while his nephew's L. 300 was to be a burden upon his executors. The Lords repelled the defence against the pursuer's title, and found, That, notwithstanding of his being heir, he was not excluded from pursuing for the debt libelled. 4th December 1728, Robertson *contra* Executors of the deceased Dr. Robertson. — In a contract of marriage the husband obliged himself to provide 12000 merks to the children of the marriage, payable at marriage, or at the male children's age of 21, and the females age of 16, which event should first happen. And it is declared, "That the foresaid sum should be in full satisfaction to the children of all that they could claim from their father, except what he should give or provide to them of his own free will; as also, excepting what should accrete or belong to them as his heirs or nearest of kin." The Lords were of opinion, That an obligation of this sort is not to be strictly interpreted like a bond of borrowed money; that it implies no more, than that in all events the children shall enjoy or succeed to their father's effects, to the extent of the sum stipulated. And therefore the heir, who in the present case succeeded to the land-estate *præceptione hæreditatis*, by a disposition, bearing *love and favour*, claiming over and above, from the younger children who succeeded to the moveables, his proportion of the said 12000 merks, they found, That the claim was satisfied and extinguished by his succeeding to the land-estate. 14th December 1739, Pringle of Symington *contra* Alison Pringle.

AN infestment granted by a husband to his wife, presumed to be in implement of a clause in their contract of marriage, obliging him to lay out a certain sum for her life-rent provision, tho' the infestment bore no sort of relation to the contract. Durie, 17th February 1632, Kinnaird *contra* Yeaman. — And in general, deeds granted in favours of a wife are presumed to be in implement of her claims upon the contract of marriage. Haddington, 23d January 1611, Common seal *contra* Trail. Haddington, December 1614, Relict of Crawford *contra* Crawford. — The like. Haddington, March 1594, Kyle *contra* Logan. Hope, (Husband) 9th February 1615, Muirhead *contra* Danieston. Forbes, 4th July 1712, Hamilton *contra* Lord and Lady Ormiston. Bruce, 12th November 1714, Blair *contra* Hamilton. — A man who, in his contract of marriage, was bound to employ 60000 merks to himself and spouse in conjunct-fee and life-rent, did thereafter grant a bond to her for L. 7000 Sterling, upon the narrative of *important causes and considerations*, obliging his heirs, not of his own body, to pay the same; the Lords found, That the bond is to be imputed in satisfaction of the obligation in the contract of marriage, seeing *nemo præsumitur gravare hæredem*, tho' the bond was plainly a *donatio mortis causa*, not intended to burden the husband nor even the heirs of his body. Fountainhall, Forbes, 16th November 1708, Houston *contra* Hamilton of Bangour. — One who in his contract of marriage was bound, that 3000 merks should return to his

wife failing children, provided her, *stante matrimonio*, to 6000 merks in case of no children, and thereafter took bonds for several sums payable to him and her, and the longest liver, and to the bairns, &c. which failing, to her heirs and assignies; The wife claiming the 6000 merks bond, and also the sums in the other bonds by virtue of the substitution; It was alledged for the heir and nearest of kin, That *debitor non præsумitur donare*. The Lords sustained the brocard, and found the substitution in the other bonds was in implement of the 6000 merks. *Harcus, (Bonds) 2d February 1686, Selkirk contra Inglis.*

Tocher
granted in a
contract of
marriage,
how far pre-
sumed in satis-
faction?

A TOCHER granted to a daughter in her contract of marriage, interpreted to be in satisfaction *pro tanto* of all former special provisions, tho' not so express'd. *Stair, 29th June 1680, Young contra Pape. Maitland, 15th December 1569, Cockburn contra Ld. Cambusnetham. Fountainhall, 22d June 1680, Seaton contra Seaton. Stair, Fountainhall, 24th June 1681, Dowes contra Dow. Falconer, Fountainhall, Home, 27th November 1685, M'Intosh contra Robertson. Fountainhall, 28th January 1688, Ayton contra Napier. Harcus, (Bonds) 2d February 1688, Lord Yester contra Earl Lauderdale. Fountainhall, 12th November 1698, Sydserf contra Sydserf. Fountainhall, 9th February 1699, Earl Northesk contra Ld. Phinhaven.* — This found with regard to an obligation in the father's contract of marriage, to secure a sum named to himself and wife in conjunct fee and liferent, and to the heirs and bairns of the marriage in fee. *14th June 1737, Stenhouse contra Young.* — But not of any undetermined general claim or provision, such as the legitim, or a clause of conquest, which is only in hope. *Stair, 24th June 1681, Dowes contra Dow. Home, 4th February 1726, Gibson contra Marjoribanks.*

Where the
cause of grant-
ing is express,
that must be
the rule.

A MAN, in his brother's contract of marriage, obliged himself to pay to him and his heirs a certain sum, under a certain condition, thereafter he granted bond to the eldest son of the marriage for the same sum, and under the same condition, bearing *for love and favour and for bettering his patrimony*: It was pleaded, That these two bonds were for the same cause, the one in implement of the other, having both the same sum, payable under the same condition, & *debitor non præsумitur donare*. Answered, Where a debtor expressly gifts *for love and favour*, there is no place for a presumption *quæ cedit veritati*. The bonds were found distinct. *Stair, 5th December 1671, Dickson contra Dickson.* — A *Donatio mortis causa* by a man to his nearest of kin, to whom he was owing a small sum by bond, was not found to be in satisfaction of that bond. *Stair, 16th June 1665, Cruikshank contra Cruikshank.* — A father having left a legacy to his second son, *in full satisfaction of all he could demand by his father's death*; it was not found to be in satisfaction also of a legacy left by a grandfather, and uplifted by the father; for tho' it was argued, That the father was here strictly debtor to his son, by uplifting the grandfather's legacy, & *debitor non præsумitur donare*, it was answered, That this presumption yields to a stronger of paternal affection; besides, that the words of the father's legacy cannot comprehend the other legacy, for the father being directly debtor therein, the son could demand the same, without waiting for his father's death; and therefore *this did not arise to him by his father's death.* *Stair, 15, Gosford, 16th Decem-*

December 1668, Winram *contra* Elies. — A grandfather who stood obliged to pay 1000 merks to his daughter and grandchildren, disponed an estate to his son, whom he burdened with the payment of several debts due by the disponer, particularly enumerated, and with the payment of 1000 merks to the said grandchildren for their better provision, and these claiming both sums, it was alledged, That *debitor non præsumitur donare*. Answered, The last sum is not payable by the same person, and altho' in the same paper, other payments with which the disposition is burdened, are express'd in satisfaction of debt, yet this last sum is declared payable to the grandchildren for their better provision, which imports that they should be better provided than they were before, and do not in the least mention the grandfather's obligation, and there is an opulent estate left to the disponer's wife in fee. The Lords having considered the circumstances of this case, found both sums due to the grandchildren. Marcus, (*Bonds*)

December 1685, Ord *contra* Inneses. — A bond, and infeftment thereupon, being granted by a husband to his wife, and mentioning only love and favour, the Lords found, That altho' it was never revoked, yet it ought to be understood to be granted in satisfaction of her contract of marriage *pro tanto*, *quia debitor non præsumitur donare*. This, the observer of the decision says, was wrong, because the brocard only holds where there is no cause express'd of the donation, as there was here: viz. love and favour. Durie, 17th February 1632, Kinnaird *contra* Zeaman. — It being alledged against a relict, That she could have no share of the moveables, because a considerable legacy was left her by her husband, which was presumed to be in satisfaction of what she could ask as relict; the Lords repelled this, in so far as it might exclude her from her share of the moveables, because the legacy was out of the defunct's part, which he may dispose on at pleasure; but found, That if the relict were claiming a share of the defunct's part for executing the testament, the legacy, if it be more, would exclude her, and if it be less, it would be imputed in her claim *pro tanto*. Nicolson (*Legacy*) 18th July 1622, Kennedy *contra* Jack. Fountainhall, Stair, 12th January 1681, Morison *contra* Trotter, La. Craigleith. — A husband being obliged to provide his wife to a sum of money in liferent, and thereafter, for love and favour, infefting her in a tenement of land; the Lords refused to ascribe it in satisfaction of the first obligation. Gosford, 23d January 1673, Fenton *contra* Skinner. — A party granting a bond to another for a considerable sum, on account of great services done by him to the granter; and the said granter thereafter giving another bond, obliging him to infeft the same person in some lands, without any relation to the former bond, but bearing to be for a particular piece of service he had done him; the Lords found, That the Rule, *debitor non præsumitur donare*, took no place in this case. Dirleton, 10th February 1676, Abernethy *contra* Forbes. — A woman having an heretable obligation for her jointure, and intrometting also with her deceased husband's moveables, by virtue of a separate title, as universal legatrix nominated; the Lords found the moveables liable *primo loco* for implement of her contract, and that her intromission therewith did satisfy the same *pro tanto*, seeing *debitor non præsumitur donare*, tho' the obligation for her jointure had *tractum futuri temporis*, and so seem'd only to affect the heir, because such rights do properly accresce to heirs. Fountainhall,

8th July 1697, Callendar *contra* Ruffel. — A Person having given a disposition *mortis causa* of her wearing clothes to her aunt (who was also her creditor) that had attended her during her sickness, and at the bearing of her children; the Lords found, That this was not to be considered as payment or satisfaction, but as a meer donative. Forbes, 24th July 1706, Weemyfs and Whyte *contra* Murray.

Right taken
in name of a
third party not
delivered.

AN assignation taken, and intimated in a third party's name, without his knowledge or participation, and where the assignation remained with the granter, was not found a conveyance to the third party, because he was not creditor to the cedent, and therefore his name was presumed only to be borrowed for the cedent's behoof, in order to do diligence. Stair, 1st February 1672, Cockburn *contra* Ld. Cragievar. A bond taken in name of a creditor, is not presumed to be in trust for the behoof of the procurer of the bond, but in security to that creditor, and cannot be warrantably given up by the procurer, or affected for his debt, altho' not delivered to the creditor in whose name taken. Stair, 12th July 1677, Bayn *contra* M'Millan. — Found, That a debtor granting assignation to his creditor, and causing intimate the same in the creditor's absence, but retaining the assignation and instrument of intimation in his own possession, is not denuded till the assignation be delivered to the creditor, or to some person for his behoof. Marcus, (*Assignation*) January 1685, La. Hilseside *contra* Littlegill.

Right taken
in name of
children.

A PERSON having purchased a right with his own means, took the assignation in the name of a daughter *in familia*, and caused intimate the assignation to the debtor, but still keeping the assignation in his own hands: He afterwards discharged the debt, which was found unwarrantable; for the Lords found, tho' the presumption be, when a man takes a right in name of a child *in familia*, that he means to have it in his power to alter, as well as where he is the granter of the deed himself; yet if he make delivery to his child, or, which is equivalent, complete the right in the child's person by a publick deed, such as infestment or intimation, his power of alteration is at an end; he has done all that he can do in law to divest himself. Dirleton, 20th November 1667, Trotters *contra* Lundie. — And upon this ground, a father having purchased some lands in the name of an infant son, and also having taken infestment in the son's name, the father's creditor, who afterwards apprised these lands, was found to have no right. Stair, 10th July 1669, Garner *contra* Colvin. — A tacksmen of lands giving up his own tack to the proprietor, and taking a new tack in name of his son, an infant, which remained in his own hand, without any possession attained upon it in the son's name, his promise to discharge and deliver up the said tack was found relevant against the son. Stair, 22d December 1674, Marquis of Douglas *contra* Somervell. — A debtor purchasing in an apprising, led against his own estate, and taking the conveyance in name of a trustee, who granted backbond, declaring the right to be in his person for the behoof of the debtor's eldest son, who was *in familia* with him, all this was understood to be for the father's behoof, *quia donatio non præsuntur*; and therefore the apprising was declared extinct *confusione*. Stair, 5th July 1677, King's Advocate *contra* Forbes. The like. Stair, 15th January 1662, Grant *contra* Grant. — One disposing his estate to his eldest

eldest son, took from him bonds of provision in name of his children, one of which he afterwards cancell'd, because his daughter's behaviour, in whose name it was, displeased him; in a pursuit for payment of the bond against the granter's heir, it was pleaded, That delivery to the father for behoof of the children, was the same as if delivery had been made to themselves personally. Answered, The presumption lies, That the father intended to keep these bonds in his own power, as much as if they had been granted by himself. The Lords assilzied. Home, 6th July 1717, *Ros contra Bayn of Tulloch*. — But where a mother lent her son's money, and took a bond in his name, it was found to be the son's evident, tho' she retained the same in her own custody, and afterwards discharged it; for the money being the son's, her taking the bond in his name, could admit of no other construction, than that it was for his behoof. Stair, 18th February 1671, *Dundas contra Ld. Ardros*. — And with regard to the question, by whose means the right is purchased, tho' in the case of a father and a child *in familia*, the presumption must ly, that the right is acquired by the father's means; 'tis otherwise in the case of a mother, whose children have means of their own left by their father; for where she takes a right in name of a child, 'tis presumed to be purchased by the child's effects, which was found, tho' she was neither tutrix nor curatrix to her child, and what intromissions she had were fairly accounted for, only they had no other tutor or curator, and it was thought hard to oblige their heir, with whom the question was, at a distance of time, to condescend upon what effects they had. Stair, *ibid.* — A party in the late times, to free himself from the rigour of the laws against field-conventicles, having disposed his estate, both property and liferent, in favour of his eldest son, who was also infest thereupon; but when that storm blew over, having destroyed the disposition, and now being pursued by the son's relict to exhibit the same, and the question being stated, Whether fraudulently put away or warrantably destroyed; the Lords found, the disposition being only *ad specialem effectum*, that this view ceasing, he might warrantably cancel it. Fountainhall, 26th July 1706, *Lady Bradisholm contra Bradisholm*.

THE delivery of any considerable quantity of victual, is presumed to be in the ordinary way by sale, and for the ordinary price, unless the receiver instruct another cause or another price. Stair, 15th June 1677, *Home contra Jamieson*. — Delivery of some ware and money by a rich man to his brother, who was no merchant or factor, the particulars being useful to the receiver, and of no great value, was presumed to be a donation. Stair, 13th November 1679, *Anderson contra Anderson*.

Delivery of goods, what cause presum'd?

The Lords were clear, That a paper granting the receipt of money, did imply an obligation to repay, unless granted to a debtor. Fountainhall, Forbes 11th June 1711, *Donaldson contra Walker*. — Yet in a case, where an old rich man, who had no children, and was in use to gratify his poor friends with the like favours, and where the heir of that man was the very person who, in his name, and as his factor, took such a ticket from one of the said old man's poor friends, without inserting a clause for repayment, and yet, after

Money given upon receipt.

his death, insisting for it, the Lords thought that this omission must be construed against him, *qui potuit legem apertius dicere*, and therefore found the receipt not obligatory in this circumstantiated case. Fountainhall, 7th January 1703, Ogilvie *contra* Abercrombie.

Error rather
presumed than
donation.

THE heir, being tutor to the executor, did, amongst the other goods, confirm an heretable bond in his pupil's name; this was found not to be meant a donation, but rather presumed to be an *error juris*. Durie, 8th July 1637, Dickson *contra* Ld. Orkhill. The like. Stair, 28th June 1672, Gilgour *contra* Menzies. --- A titular having disposed to an heritor the teinds of his whole lands, and in enumerating the particular rooms as belonging to the disponee, of which the teinds were conveyed, a room being adjected that never belonged to the disponee, and was no part of his barony; the Lords found, That this must be presumed to have happened through mistake, especially, that the disponent continued, as formerly, in possession of the controverted teinds. Gilmour, February 1664, Earl of Errol *contra* Mowat. --- A ratification of a contract, narrating the contract differently from what it was, not found to be further obligatory than according to the true tenor of the contract. Durie, 28th January 1631, Graham *contra* Stewart.

Novatio non præsumitur.

ANY right granted by a man to his creditor, tho' above the value of the debt, is presumed to be in further security, not in satisfaction. Fountainhall, 8th February 1711, Nicolson *contra* Morison. --- A new bond for the same debt that was contained in a prior bond, granted by other obligants, was found not to be an extinction of the former bond, but only an additional security. Durie, 29th March 1626, King *contra* Tailor. --- A creditor having charged for the whole sum in a bond, after the debtor had accepted a bill for a part thereof drawn by the charger, payable to a third party, who, by his declaration produced, appeared to be only a trustee for the drawer's behoof; the Lords found the debtor in the bond, notwithstanding his acceptance of the bill, liable to pay the whole sum charged for, the charger finding caution, upon payment, to warrant the payer against payment of the bill. Forbes, 10th July 1713, Ramsay and Reid *contra* Spalding. --- A creditor having taken a bill from his debtor for his sum drawn upon a third party, who accepted the same, and thereupon adjudged the acceptor's estate; the Lords found, That the creditor might still insist against the drawer upon his bond, seeing both securities did subsist till payment were made; notwithstanding that delegation was alledged by the common law to be a species of novation. Fountainhall, 6th July 1697, Hay *contra* Hall. Forbes, 10th July 1706, Brand *contra* Yorfoun. Forbes, 26th June 1711, Oswald *contra* Gordon. --- An heiress, to secure a tailzie in favours of her two sisters, having, by a clause therein, obliged herself not to contract debt without the consent of two interdictors therein named, and thereafter marrying, and, with consent of her husband and the interdictors, making another bond of tailzie in the terms of the former, and only assuming her husband into the conjunct-fee and liferent with herself,

herself, but without repeting the clause of interdiction, and thereafter contracting an heretable debt on the estate, the Lords, in a poinding of the ground at the instance of the creditor, wherein compearance was made for the presumptive heir of tailzie, and also for the interdictors who had not consented to the bond, sustained the interdiction as valid, and found that the second tailzie was not a novation of the first, and therefore reduced the debt, as being contracted after the interdiction. Fountainhall, 23d December 1703, Row *contra* Bruce.

IN a process against a cautioner, this exception, That the principal had given to the creditor infestment of his lands *in full satisfaction of that sum*, was found relevant to assilzie, altho' it was alledged, That, notwithstanding of these words, the infestment was only to be look'd upon as a further security, and that *novatio non præsumenda est, sed exprimenda*. Durie, 23d July 1633, Lawson *contra* Scot.

Payment being made, who understood to have advanced the Money ?

A PARTY having paid some debts owing by his creditor, and taken discharges thereof, bearing payment to have been made by the creditor's money ; the Lords found that these discharges could not be redargued but by the oath of the said creditor, whose debts were paid, altho' they had never been delivered to him, but were still in the payer's hands who received them. Forbes, 26th July 1711, Halyburton *contra* Cook. — The Lords refused to allow discharges taken by a tenant, of debt owing by his master to a third person in his accompts, because the discharges bore, that the money was received from the master himself, altho' the tenant, with these discharges, produced a declaration, *ex post facto*, under the creditor's hand, that he was paid by the tenant. Forbes, 26th July 1711, Nisbet *contra* Johnston.

Where the receipt is express.

A TICKET bearing the receipt of money from a person in name of another, presumes the money to have been the *debtor's* and not the *deliverer's*. Stair, 20th January 1672, Trotter *contra* Robertson.

Prefumed to be his money in whose name it is delivered.

A PERSON having subscribed in the books of the African company a certain sum for himself, and particular sums for others in copartnery with him ; and the moieties paid to the company conform to the said subscription, being recorded in their books, sometimes as made by the subscriber and partners, and sometimes indefinitely, as paid by the copartners, and the said other persons being stated as creditors to the African company in their respective sums, by a certificate obtained from the committee of directors, in the terms of the act of parliament, the Lords found the subscription to be to the behoof of these other copartners, effeiring to their several sums, and found that the money was presum'd to have been advanced by them, unless redargued by their oath or writ that it was the subscriber's money. Forbes, 24th February 1708, Creditors of Corse *contra* Pedie, &c. — A receipt of money running thus, *I, &c. grant me to have received, &c. in name of, &c. such a sum, as witness my hand, &c.* the Lords found, That the money belonged to the party, in whose name it was said to be received. Fountainhall, Forbes, 12th June 1711, Donaldson *contra* Walker. — One of two *correi debendi* by a bond, having paid several

years annualrents, and taken some of the receipts of the money by the creditor, *from him for himself, and in name and behalf of the other coprincipal debtor*, and some of them only bearing receipt thereof from him, without the addition of, *for himself, and in name and behalf aforesaid*, the Lords found that other coprincipal liable to refund to the payer, the half of the sums in the latter discharges, but no proportion of the sums in the former discharges, it being presum'd, from the tenor of these, that he had advanced his share to the payer. Forbes, Fountainhall, 27th November 1711, Gordon *contra* M'Ghie.

Presumption
from being
possessed of
the document.

A FACTOR's possession of bonds or bills granted by his constituent, does not presume that he paid them. Forbes's MS. 22d July 1714, Viscount of Garnock *contra* Wilson. — A translation to a bond being taken by one of a company of merchants, blank, and so found among his papers after his decease; the Lords nevertheless found, That it was presumed to have been purchased with the money of them all. Bruce, 18th November 1714, Irvine *contra* Charteris. — The question occurred about a bill accepted by two debtors, retired with a blank indorstation, and found in the custody of one of them, whether this possession did not imply that the money was paid by him alone, so as to found an action of relief against the other; or whether the presumption must run, that both contributed equally to the discharge, since it did not relate to either in particular; The last presumption was sustained. 7th December 1728, Campbell *contra* Cockburn.

Money bor-
rowed and
debt paid *ex*
incontinenti, the
money pre-
sum'd applied
for payment of
the debt.

AN heir of entail having, after the decease of the maker of entail, borrowed money, and having also paid the defunct's debts, the Lords presumed, that the debts were paid out of the borrowed money, and therefore found, That the borrowed money was a burden upon the entailed estate. Against this a contrary presumption was urged, That if the money had been advanced to pay the tailzier's debts, the creditor would not have failed to take an assignation to these debts for his security; which he not having done, the presumption ought to ly against him. 29th January 1731, Gordon of Gartie *contra* Sutherland of Kinminnity.

In dubio, the
principal is
presumed to
have retired
the bond.

AN heretable bond being produced by the heir cancelled, is to be presumed paid by him, and not by the executor, the heir always making faith. Gosford, 2d July 1669, Wilson *contra* Dawling.

Vitiated Writs, when presumed fraudulent, when innocent.

A writ be-
ing vitiated,
when pre-
sumed to be
done *dolo*?

A TACK vitiated in the date of the entry, sustained, the entry being presumed to be at the date of the writ, and consequently no intention of falshood. Durie, 4th December 1629, Oliphant *contra* Peebles. — A bond was found null, in respect that in a material place there was about half a line so obliterated, that it could not appear what had been written thereon; and as it might have been a material clause, it was presumed deleted *dolo*se by the creditor. Stair, 22d November 1671, Pittillo *contra* Forrester. — Superinducing of a principal sum conform to the clause of annualrent, which was fairly writ in the body of the bond, and which superinduction appeared to be no more than supplying

supplying an omission in the writer, was presumed to be done innocently, and the bond sustained, tho' no demand had been made upon it for the space of 30 years. Gosford, 8th February 1672, Wright *contra* M'Leod. ---- Two lines in the onerous cause of a disposition being wholly deleted, and not bearing to be done of consent, the Lords, at the instance of a creditor, reduced the whole disposition, as presumed *doloſe* done, without prejudice to the haver to insist on any other documents for aſtructing his right. Fountainhall, 20th June 1701, Brown *contra* Herries. ---- A bond granted under a condition and provision, the clause containing the terms of the condition being cancelled and torn, so as not to be legible, was found not to be a binding evident, because the condition might have been such as to furnish a defence against payment. Forbes, 18th July 1712, Earl Bute *contra* Halyburton. ---- In an action for registration of a mutual contract, the Lords aſſoiled, because the contract was blank in some parts, interlined, torn almost through, and batter'd on the back; chiefly because the pursuer in his oath of calumny confessed, that he had received the contract blank in some lines, which he filled up thereafter. Hope, (*Contract*) 15th May 1613, Lord Forbes *contra* Sinclair. ---- An objection against an execution of an apprising served against a minor, that tutors and curators were not mentioned in the body of the execution, but interlined, was repelled, in respect it did appear by ocular inspection that the same was done *ex incontinenti*, and that all was done with the same hand and same ink. Fountainhall, 20th December 1705, Scrymgeor *contra* Betſon. ---- The surname of the executer of an inhibition being interlined in the execution, the Lords repelled the objection, and sustained the writ, as being no superinduction, but only an omission supplied by interlining. Fountainhall, 14th December 1697, Lawson *contra* Creditors of Lindsay. ---- The Lords sustained a gift under the great seal, altho' the words *per saltum* were superinduced in the warrant, and some words not material therein scored, in respect the superinduced words were in effect in the warrant in other words not superinduced; and the margin subscribed by the keeper of the seal bore, that the scoring was by order of the Lord Chancellor and consent of the donatary, who had most reason to quarrel it. Forbes, 4th February 1709, Cumming *contra* Kennedy. ---- The extract of an assignation, narrating 3500 merks to be due to the cedent by some third party, and that the assigney had advanced to him a certain sum in lieu of the aforesaid sum of 3500 merks, and therefore that the cedent did assign him to the aforesaid sum of 3000 merks, and obliged him to warrant the assignation of 3500 merks from his deeds done or to be done; the Lords found, That the assignation as it stood, did virtually convey the whole 3500 merks, and therefore sustained the writ, altho' the odd 500 merks was interlined in the dispositive clause, but the interlining was found to be unwarrantable and punishable. Forbes, 21st December 1709, Mrs. Lyon *contra* Earl of Aboyn. ---- A tack being razed and vitiated in the date, it was found presumed, That the date had been altered in order to obviate an inhibition, and therefore it was found not a valid and probative writ in prejudice of the inhibitor. Dirleton, 26th July 1673, Bayne *contra* Cave. ---- It was found to be a nullity in an apprising, that the third sheet appeared, from ocular inspection, to have been made up and put in since the allowing of the apprising, tho' the

apprising was offered to be supported by production of the letters and executions to which it was conform ; which was not found relevant, it being sufficient to say, that *non constat* this was the apprising signed by the messenger, that the presumption was otherwise from the viti-ation, and that therefore the writing can bear no faith. February 1729, Duke of Roxburgh *contra* Rutherford.

Blanks in Writs filled up, at what Time presumed ?

JOHN BUCHANAN in Stirling having, in *liege poustie*, disposed his estate to *his friend and kinsman John Buchanan of* , the disposition was recovered after his death from his wife, with the blank designation filled up with these words, *of Leney*, in the defunct's handwriting ; in a reduction *ex capite lecti* it was pleaded, That no disposition on death-bed, nor no substantial clause in a disposition filled up upon death-bed, can prejudice the heir ; and it must be incumbent on the disponsee to prove, that the blank was filled up in *liege poustie* ; and to oblige the heir to prove that the blank was filled up in *lecto*, would render the law of death-bed elusory ; for what may be done at any instant *remotis arbitris*, is not capable of a proof ; and the filling up the words *John Buchanan* at first, doth not alter the case, for notwithstanding thereof *defuncti voluntas collata erat in personam incertam*, there being several John Buchanans kinsmen to the defunct. And as the deed would have been void, had it been left blank, the defunct could no more supply the nullity upon death-bed in prejudice of his heir, than he could grant a new disposition. Answered, It is presumable the blank was filled up privately about the time of subscribing the deed, that none of his relations might be disoblighd ; and it is usual to subscribe tailzies or assignations in favours of a blank person, and then privately to fill up the persons name ; and if the date of inserting the holograph designation behoved to be proved, many deeds in favours of children and near relations would be overturned. The Lords found it presumed, That the filling up of the blank was of the same date with the disposition. Marcus, (*Lectus ægritudinis*) November 1683. ---- Our author observes, that the like was decided January 1687, Thomson *contra* Pennycook. ---- A debtor granted a disposition of his estate to two of his creditors, *for satisfying of the debts due to them in the first place, and for payment and satisfaction of the disponent's other creditors underwritten* ; after which words there was a large blank that appeared, from ocular inspection, to be filled up with a different hand from that in which the disposition was writ : A creditor, who had used inhibition posterior to the disposition, intended reduction against these creditors whose names were insert in the blank, upon this presumption, That the blank was filled up after his inhibition. The Lords found, That the blank being filled up with another hand, and the writer thereof not express'd, it was presumed to be posterior to the inhibition. Stair, Gosford, 15th January 1670, Lady Lucy Hamilton *contra* Ld. Dunlop. — In a reduction of a disposition at the instance of an apparent heir, it was proved, that the disponsee's name was blank when the deed was subscribed, and for some weeks thereafter ; whence the pursuer argued, That as there was no evidence at what time the blank was filled up, it might have been done

done on death-bed. Answered, The disposition being in the grantee's hand, is presumed to be a delivered evident of the date, and would be effectual tho' it were still blank. Replied, The grantee was the defunct's factor, and intrusted with his writs. Duplied, There were letters and other documents to clear that the disposition was *a principio* intended for the defender. The Lords would not put the defender to prove when the writ was filled up, but ordained him to be examined *ex officio* with relation to what the defunct did express when he delivered him the disposition, whether it was for his own behoof, or for what other purpose. Stair, 9th July 1678, Henderson *contra* Monteith.— In this case, the Lords found it relevant to reduce the disposition as on death-bed, to be proved *prout de jure*, that it remained undelivered in the granter's charter-chest, or in his power, till he contracted the sickness whereof he died. Which comes to this, That with regard to an undelivered evident, tho' the presumption may ly, that the blank is filled up at the time of subscription, yet if it appear that it was not then filled up, the grantee must prove the time of filling up the blank, otherwise it will fall as upon death-bed. Stair, *ibid*.

Delivery when presumed made, and to whose Behoof?

A FATHER granting bonds of provision in favours of children *in familia*, and thereafter contracting debt; the Lords found, That even these posterior creditors are preferable to the children; *ratio*, tho' in other cases bonds in the hands of the creditor are presumed delivered *ab initio*, yet the presumption lies against children, that they are still in the father's hands, and that he is master thereof; and that *eo ipso*, when he contracts debt, he revokes the said provisions, in so far as they may prejudice creditors, unless it appear that they were delivered, and that they were the children's evidents at contracting the posterior debt. Dirleton, Gosford, Stair, 14th November 1676, Inglis *contra* Boswell.— The like. Fountainhall, 24th July 1701, Chiesly *contra* Chiesly.— A father having granted a disposition of some tenements to his son, which failing, to his daughter, which was kept latent, and no infeftment taken upon it for 17 years thereafter; a debt contracted after the disposition, upon which adjudication followed after the infeftment, was preferred, there being no presumption, that a disposition of this nature was delivered of its date, and if it was delivered after contracting of the onerous debt, it was reducible upon the act 1621. Fountainhall, 16th November 1697, Symson *contra* Finlay.

Bond of provision not presumed delivered of its date:

ONE having executed a bond of provision in favours of his children, and delivered the same to their mother's brother, this delivery was not presumed to be for the behoof of the children, but understood to be a *depositum*; and therefore exhibition was sustained of the bond at the father's instance, as his own evident, which he might alter or cancel at his pleasure. Durie, 21st February 1628, Ld. Monimuslk *contra* Ld. Pittarrow.— The contrary was found with regard to an assignation executed by a mother in favours of her son, and put in the hands of his wife's father, which was presumed to be for the son's behoof, and consequently

Delivery to a third party, whether presumed for behoof of the granter or grantee?

sequently it became his evident upon the delivery. Durie, 11th June 1630, Fairly *contra* Fairly.

A DISPOSITION having been delivered by the feller to a writer, in order to draw a charter in favours of the purchaser; this was not understood equivalent as if delivery had been made to the purchaser himself; and so there was still found *locus pœnitentiæ*. Durie, 16th December 1626, Byres *contra* Johnston.

ONE having executed an assignation of a bond of 4000 merks, in favours of his daughter, with warrandice from fact and deed, and a reservation of the granter's liferent, did deposite the bond and assignation in the hands of the minister of the parish, upon the following terms, contained in a writing subjoined to the assignation, "That it was to remain in the depositar's hands during the granter's lifetime, or while he should have use for the said bond for security of his reserved liferent, to be delivered after his decease to the daughter, to be disposed of by her at her pleasure;" The Lords found the assignation a delivered evident, and not revocable; and therefore reduced a second assignation granted of the same bond by the father. Forbes, 26th June 1707, Sinclair *contra* Purves.

Rights when presumed simulate?

Disposition
of moveables,
retenta possessione.

IN a process upon the passive titles, the defender acknowledged his intromission with the heirship moveables, but that it was in virtue of a disposition from his father. Objected, That the disposition was null *retenta possessione*; the Lords sustained the answer, That the father and son lived in the same house, and that it must be reputed the son's possession, he being married, and the father old and infirm and a widower. Durie, *penult.* January 1630, Calderwood *contra* Porteous. — The Lords sustained a disposition, made by a tenant to his master, for security of bygone rents, in competition with a gift of escheat, tho' he suffered the tenant to continue in possession, but the disposition was before the tenant's rebellion. Gilmour, June 1662, Bowis *contra* Barclay. — In a process of spuilzie, the defence, of lawfully pointed was sustained, tho' it was alledged, That the goods were sold and delivered to the pursuer by the defender's debtor, the price paid, and he in possession for divers days before the pointing, because the pointed goods were in the debtor's cellar, and pointed out of it, and looked after by his servants. Newbyth, 9th February 1666, Haitlie *contra* Lyle. — In a reduction at the instance of creditors, of a disposition granted by the common debtor in favours of his sister and brother-in-law, of his house and shop, upon this reason, That the same was simulate, seeing it was made *retenta possessione*, he having continued in the possession for two years, keeping open shop, and continuing his business as formerly; the Lords, in respect that the sasine upon the tenement was not taken for 18 months after the date of the disposition, and that the common debtor continued to possess, and the same being all the estate he had till he broke, reduced the disposition as simulate, *ad hunc effectum*, to bring in all the creditors *pari passu* according to their diligence; in this case the Lords refused to reduce upon the act 1621, because the pursuers had done no diligence, and the defender offered to instruct the onerous cause of the disposition. Falconer, 11th January 1682

1682, Creditors of Hamilton *contra* Hamilton. — A disposition *omnium bonorum* by one merchant to another in security of debt, was found reducible *quoad* goods in the shop, and household plenishing, of which the disponent retained possession until he broke; but it was sustained in so far as concerned the heretage, altho' the disponent was likewise allowed to continue to uplift the rents thereof. Forbes, 27th July 1708, Boigs *contra* Watson. — A party, who confirmed his debtor's household furniture as executor-creditor to him, was preferred to another who had a general disposition with symbolical possession, the disponent continuing in the natural possession for life, altho' the receiver of the disposition attained the natural possession after the disponent's death before the executor's confirmation. Forbes, Fountainhall, 19th June 1711, Liddel *contra* Davidson.

A GIFT was found not to be presumed simulate by the conjunct person's remaining in the house with the rebel. Haddington, 27th June 1605, Home *contra* Home. — The Lords found a gift of escheat, partly simulate and partly not, simulate *ob retentam possessionem*, consenting to wadsets, tacks, &c. made to the rebel, and acquiring wadsets from him, &c. but not simulate in so far as it was taken by the donatar, as creditor, for his own relief: Hope, (Creditor) 18th December 1623, Lord Yester *contra* Murray. — A rebel at the horn being suffered by the donatar of his escheat to remain for several years in possession of his rents, infers a sufficient nullity upon the act of parliament 1592, against the donatar at the instance of any of the rebel's creditors. Durie, 28th March 1637, Hamilton *contra* Tenants. — A rebel his being in possession for five years or thereby, infers the presumption from the act of parliament 1592, That the gift was simulate. Dirleton, Stair, 6th January 1666, Oliphant *contra* Drummond. — In the same cause the Lords found, That it does not alter the case, that the donatary was a creditor, seeing law presumeth he was satisfied, and gifts being ordinarily affected with a backbond in favours of other creditors, it was his fault that he was not satisfy'd, and that he should not, by his negligence or collusion, prejudice other creditors, who would have right after his satisfaction. Dirleton, *ibid.* — A son's being donatary to his father's escheat, and suffering him to possess for less than a year, was not found to make his gift null. Gosford, 4th December 1669, Jeffray *contra* Jeffray. — Presumption of simulation, from the rebel's continuing in possession, taken off by contrary presumption. Stair, 12th December 1673, Dickson *contra* M'Culloch. — Presumption of simulation, from the rebel's continuing to possess, takes only place where the rebel has a visible and considerable estate of lands or tacks, and is in possession thereof, but *secus*, where it was only an acre or two, or consisted *in nominibus*, which the donatary was not concerned to know or notice. Dirleton, 20th December 1676, Veitch *contra* Pallat. — In a reduction of a gift of liferent escheat, it being alledged that the gift was simulate *retenta possessione*, in so far as the rebel was suffered to possess a house, the rent whereof fell under his escheat, and made a considerable part thereof, and was not removed by the donatary for the space of five or six years; the Lords thought that there was a difference betwixt a rebel's being suffered to continue his possession of a house after a gift and declarator, and his lifting rents from other tenants,

nants, where he was not in the natural possession himself, which the donatary ought to interrupt, and therefore found no simulation in the present case, and assoilzied from the reduction, and decerned in the mails and duties, preferring the donatary. Fountainhall, 10th June 1707, *Shearers contra Murray*.—A gift of liferent escheat was found not to be simulate and null, for the rebel his continuing to possess a small part of his estate, the donatary having so far prosecuted his right, as to obtain possession of a great part of the estate by virtue of the gift and other rights in his person. Forbes, 19th February 1713, *White contra Reid*.

2do, Procur-
ed upon there-
bel's expence.

THE Lords found a gift simulate, tho' only a part of the expences in procuring it was laid out by the rebel, and that the donatar, who had bestowed the rest, was really a creditor, and the rebel had purchased the gift to him for security of his debt. Durie, Hope, (*Horning and Escheat*) 26th June 1622, *Inglis contra Ld. Caprington*.—A gift of escheat was found simulate, it being acknowledged that the rebel procured the gift, that he had it blank in the donatar's name, and that a creditor of his accepting it from him, and filling up his name therein, could not, *bona fide*, make use of it, even for security of a just debt, in prejudice also of a right flowing from the rebel after denunciation, but before the creditor's right to the gift of escheat. Stair, 17th December 1670, *Langtoun contra Scot*.—Simulation inferred from the gift's being procured by the expences of the rebel, without any further circumstance. Durie, 28th November 1626, *Earl Kinghorn contra Wood*.

3tio, Taken
in name of the
rebel's chil-
dren.

THE Lords found a gift null, it being presumed simulate, as taken to the behoof of the rebel's children, he remaining rebel, which was found alike as if it had been taken to himself; but here the children were *in potestate patria*, unforisfamiolate. Durie, Hope, (*Horning*) 25th June 1622, *Lord Borthwick's children contra their father*.—But the contrary was found, where the donatar was not *in potestate*. Durie, 20th March 1623, *Dalgarno contra Earl Marischall*.

Mandate when presumed ?

Factor pay-
ing annual-
rent for a
course of years
where none
was stipulat-
ed.

Payment of annualrent, tho' none be stipulated, infers an obligation to continue payment in time coming. And a man, through weakness, having kept his room for 20 years, during which time his mother, having managed for him, did punctually pay the annualrents of a bond, tho' none was stipulated; in a process against the debtor's representatives for payment of the bond with annualrent, the Lords found it presumed, That the mother had a warrant to pay annualrents, and therefore decerned for annualrents since the last payment. Stair, 7th November 1671, *Hepburn of Beinston contra Ld. Congleton*.

Servant tak-
ing off goods
in his master's
name.

A SERVANT taking off goods from a merchant in his master's name, was found not personally liable, and being pursued a long while after, was not obliged to instruct his warrant, but the same was presumed to have been known to the merchant, unless proved by the defender's oath that he acted without a warrant, or that he applied not the cloth to his master's use. Stair, 17th November 1665, *Howison contra Cockburn*.

JAMES

JAMES CAMPBELL of London, merchant, got a commission in name of the creditors of the equivalent, signed by a great number of them, to manage their affairs at London, for which he was to have five *per cent.* of the equivalent debentures; having managed their affairs successfully, he got payment from a great number, the rest he brought a process against upon this *medium*, That having got a commission from many of the creditors on the equivalent to act as agent for the creditors in general, and having prosecuted that agency, in a publick open manner before the parliament, where every man is understood to be present, and given account of his managment from time to time to such of the creditors as pleased to think of that matter, either here, or at London, not only these who were present at meetings, but also those who did not assent, but acquiesced and reaped the benefit, must be understood to have acceded to the commission, and so are bound in the same manner as those who signed it, *qui tacet consentiri videtur*; the Lords found, That the creditors on the equivalent, who did not expressly dissent when the pursuer did negotiate the affair of the equivalent before the parliament, were liable for the same quot of *præmium*, as those who signed his commission. 2d July 1725, Campbell *contra* Creditors of the equivalent. *Qui tacet, consentiri videtur.*

A WIFE having borrowed a small sum, and having given a bond of her husband's in pawn therefore, her having of the bond in her hand, was found to infer a warrant to borrow the money, and oblige her husband, being a matter of small importance. Stair, 4th February 1665, Paterson *contra* Pringle. *A wife pawning her husband's bond.*

FOUND, That a wife who was in use to receive her husband's rents, her continuing to receive the same, after warning, will stop removing at the husband's instance, altho' no command nor ratihabition of his be alledged. Colvil, January 1582, *contra*. Found, That a chamberlain cannot prejudice his master's action, by receiving mails, after the failzie or irritancy of a feu-charter is incurred *ob non solutum canonem*, without his said master's express order. Haddington, November 1614, Lord Madertie *contra* his Vassal. — An alledgeance in a removing made by tenants, that they made payment of some customs and services since the warning to the pursuer's chamberlains, which were applied to his use; was found not relevant, unless it had been by his knowledge, command, or allowance. Spotiswood, (*Removing*) 8th February 1627, Earl Caffils *contra* his Tenants. — The like. Durie, 5th March 1629, Ld. Ley *contra* Kirkwood. — In a spuilzie of teinds, this exception sustained to liberate both from spuilzie and wrongous intromission, *viz.* That the defender had made payment of the King's taxation imposed upon teinds, to the pursuer's chamberlain, who had paid the same to the King's collector, tho' the pursuer had before served inhibition. Durie, 22d February 1628, Lord Loudon *contra* Parishoners of Killemuir. *Rent paid to a chamberlain, if the master's consent is presumed, so as to infer his passing from irritancies, &c.*

A PRECEPT of poinding being unwarrantably executed *extra territorium*, it was not found sufficient to infer a spuilzie against the employer, unless it were proved by the oaths of the messenger and assistants, that they had express commands so to do. Stair, 8th January 1663, Murray *contra* Hunter. — The Lords having found before, *In unlawful acts.*

in a case betwixt the Ld. Aiton and Home of Plendergaist, That Aiton's brother and servants their having come out of his house, committing a spuilzie, and immediately returning thither, did make himself liable in the spuilzie, from the presumed command or ratihabition; yet now they found the contrary in a case that very little differed, *viz.* That the servants, after committing the spuilzie, returned only to their master's house two or three days afterwards. Colvil, June 1582, Dunbar *contra* Enterkine.

Soldier acting in a party.

To give the benefit of indemnity to a soldier, who had meddled with some goods, it was found, That he needed not prove his warrant, but that it was presumed, if he proved he acted with a party in war, against which the Lords would admit no contrary probation, unless it were offered to be proved by the defender's own oath, That he did, without any warrant, convert the goods to his private use. Stair, 25th June 1664, Farquharson *contra* Gardner. — The like. Stair, 15th February 1666, Lyon *contra* Gordon.

Possession how presumed, and what presumed from it?

Proprietor as he presumed to have uplifted the teind?

COLONEL Whiteford having right under the privy seal to some teinds and feu-duties of the subdeanry of Glasgow, from the year 1585 to the year 1629, pursued my Lord Kilmarnock for his teinds and feu-duties of these intervening years (prescription being interrupted) and offered to prove the defender's predecessor's possession, during these years, thus, *viz.* That his authors were in feft all that time, and have still continued heretors of the saids lands, and so are presumed to have intromitted with the teinds, which ought to be sustained as probation *in re tam antiqua*, it being now impossible to get witnesses so old as to prove the possession. The Lords found, That the pursuer ought to prove the possession for the several years *in communi forma*. Harcus, (*Probation*) Fountainhall, 6th February 1684, Whiteford *contra* Earl Kilmarnock. — The Lords found an heretor liable for the teind-duties of his lands, to the titular's tacksmen, the years that he possessed as heretor, altho' he was not proved to have been in the natural possession, or to have received a joint duty for stock and teind; and this because it was presumed, that he intromitted with the whole rent comprehending both stock and teind, seeing it was not alledged that any other person uplifted the teind. Forbes, 10th July 1713, Crawford *contra* Kennedy.

Possession of moveables presumed property.

IN an action of spuilzie for wrongous poinding, the Lords found, That the goods remaining for many years together in the possession of any person, who kept them upon his own ground, and milked, and used them, and the increase thereof, all that time, as his own proper goods; the creditors of such a possessor might lawfully poind them as their debtor's goods, which presumptive qualification of property was preferred to the pursuer's offering to prove himself the only owner of the goods, as having been bred upon his heretage, and sent only a grazing; and this because the pursuer was not able to qualify real possession of the goods for two years preceeding the spuilzie. Durie, 24th November 1624, Turnbull *contra* Ker. — In a pursuit for the restitution

tution of a book, the pursuer was obliged to condescend *quo modo defuit possidere*. Stair, 27th January 1665, Scots *contra* Fletcher. Stair, 4th July 1678, Home *contra* Livingston. --- Possession presumes property in moveables, but yeilds to stronger contrary presumption. Stair, 12th December 1665, Ramsay *contra* Wilson. Bruce, 17th February 1715, Warrender *contra* Alexander. --- A relict continuing in possession of her first husband's goods, and marrying again, and the children of the first husband claiming the goods as once belonging to their father; tho' possession be a sufficient title in moveables, yet the Lords preferred the children, because that presumption of property by possession was offered to be taken off by a contrary positive probation, that the goods were their father's. Fountainhall, 16th February 1687, Abercrombie *contra* Storie.

Prefumption rite & solenniter actum.

In a question of compensation, a discharge of a year's annuity and all preceedings, found not to import, That the same was paid yearly when it fell due, but that all was paid at the date of the discharge, unless the debtor would instruct the particular times when the respective payments were made. Forbes, 7th February 1711, Carnegie *contra* Coupar. rite actum.

IT being alledged that the minute of a decreet-arbitral was not subscribed within the time to which the submission was limited; found, That the date of the minute at the top must be presumed to be the date of the subscription, unless it were redargued, since *omnia præsumitur solenniter acta, & interpretatio sumenda est ut actus valeat*. Fountainhall, 4th January 1699, Earl Crawford *contra* Bruce. --- By the conception of a submission, an oversman being to be chosen, in case of variance, by all the judges, (in number four) and an oversman being mentioned in the minutes to have been chosen by the judges, but no mention of *all the four*, the decreet pronounced by him was sustained. Durie, 1st December 1632, Hunter *contra* Halyburton. --- The principal Letters of horning, having some words added on the margin, and an extract thereof given by the sheriff-clerk, wanting the said words, the extract was found to bear more faith than the principal, the presumption being, That the words in controversy were added *ex post facto*. Colvil, November 1586, Barclay *contra* Irvine. Solenniter actum.

According to what is common and customary, presumed.

A BUYER, by his ticket, acknowledged the receipt of a certain quantity of wine, obliging him to make payment thereof according to the condition agreed upon, the ordinary price of wine was found due, unless the debtor would offer to prove the conditions. Stair, 29th July 1665, Douglas *contra* Cowan. --- In a pursuit for rent by a verbal tack, the real worth of the lands, will be presum'd the rent agreed for, unless the tenant prove an agreement for a lesser duty. Stair, Gosford, 3d July 1674, Young *contra* Cockburn. --- In a contract of marriage, a Ordinary prices, measures, &c. presumed.

wife being provided to a jointure of some chalders of victual, it was found, that the measure of the shire was to be the rule, and not Linlithgow measure. Stair, 7th February 1678, Cleland *contra* Ld. Kirkurd. — With relation to a contract binding the heretor to pay some bolls for dry multure to the proprietor of the mill, the question arose what should be the measure; the Lords considered, that if there were a general uniform received measure in the jurisdiction and regality within which the parties dwelt, there might be reason to presume this to be the measure meant in the contract, but if they varied, there was no reason to make the measure of a single parish or barony a standard, in this case the Linlithgow measure behoved to be the rule; and therefore, before answer, they ordained the custom to be tried. Fountainhall, 23d January 1696, Montgomery *contra* Thomson. — A bond for the indefinite sum of 238 Scots, and L. 50 of penalty, with annualrent, the Lords found the indefinite sum of 238 Scots to be pounds: Here also the L. 50 of penalty was about the 5th part of the L. 238, and the 5th part of the principal sum uses to be inserted as the penalty. Forbes, 17th November 1713, Cochran *contra* Bryson.

What holding
presumed?

IN a declarator of the liferent escheat of a Lady liferentrix, the Lords found, That by her rebellion her liferent belonged to the King, unless it were alledged that she held of another superior; but found, That a sasine given *propriis manibus* by her husband, or given upon his precept, was sufficient to elide the presumption, except the donatar would say, that she was infeft to be holden of the King. Hope, (*Declarator*) 7th February 1617, Douglas *contra* Napier. — A pursuit at a donatar's instance against a vassal for the avail of his marriage, was sustained, without necessity to prove that it was a wardholding, which is presumed where the contrary is not proved. Stair, 25th February 1662, Arbuthnot *contra* Keiths.

What superior
presumed?

AN heretable bond being granted, and not bearing, that the infeftment of annualrent should be holden of the annalzier himself, but indefinitely without mention of any superior; it was found presumed for the King, that he behoved to be the superior of whom the annualrent should be holden, and therefore that the liferent escheat of the annualrenter belonged to his Majesty. Durie, 1st July 1626, Hallyburton *contra* Stewart. — The Lords refused to sustain a general declarator at the instance of a subject, concluding, That by the defender's rebellion the pursuer had right to the liferent of all the lands held of him; and found, That such a general conclusion could only be insisted in by the crown, *ex presumptione*, that all lands hold of his Majesty; but that a subject superior behoved to qualify the defender to be his vassal, and must give evidence that the lands hold of him. Durie, 22d November 1621, Ld. Muckall *contra* Stewart.

Presumptions arising from lapse of Time.

A TUTOR having assigned a bond granted to him, his heirs, assignies, &c. but bearing to be the pupil's money, and after many years

years the pupil, now major, never having sought it, the assigney's right was sustained, because presumed that the tutor, in his tutor acc'ts, had charged himself with this article; only here the assigney was ordained to find caution to relieve the debtor at the pupil's hand. Durie, 17th March 1636, Weir *contra* Arnot.

A RELICT's possession of her husband's moveables 28 years after the same had been confirmed by his executor's creditors, was sustained as a presumption that she had right thereto from the executors confirmed. Forbes, 15th February 1712, Boyd *contra* Hay.

AN assigney to a liferent-right having been long in possession, was pursued to remove, upon the presumption that the liferentrix was dead, she not having been heard of for 60 or 70 years backward; the defender admitted, were he insisting for possession upon his liferent-right he must prove his libel, viz. the existence of the liferentrix. But he contended, That, having once legally attained possession, he has nothing further to prove; his possession must continue, and the person who brings a process of removing against him, must prove that the right is at an end by the death of the liferentrix; and therefore, tho' *in dubio* the presumption of 50 or 60 years might take place as the most ordinary period of life, the question here does not turn upon the preponderating presumption; the pursuer cannot prevail unless he prove his libel, which must be done one of two ways, either by a direct proof of death, or by the lapse of such a time, after which it is past all human probability that the person is alive. The Lords found, That the pursuer not offering to prove the Lady's death, the presumption in law is for life to 100 years. 30th July 1734, Carstairs of Radernie *contra* Stewart of Duncarn. — A bond being left in legacy to a party, and failing of him by decease to his sister, the substitute after 10 or 12 years that the institute had been out of the country and never heard of, insisting for payment; and it being objected, That the institute's death behoved to be proved, the Lords refused to subject the pursuer to this difficult probation, but only ordained her to find caution to warrant the defender at all hands. Spotiswood, (*Summons*) Auchinleck, (*Legacy*) 29th February 1628, Ruthven *contra* Cleik.

AFTER the issue of a tack and full payment of the tack-duty, the tacksmen having insisted against the setter for the penalty of £. 100 contained in the tack, incurred thro' failzie of entering the pursuer into possession at a certain term; the Lords restricted the libel to damages, and found the same not now probable otherwise than by the defender's oath. Stair, 2d December 1664, Veitch *contra* Paterson. A tacksmen who was bound to keep up the houses being allowed to flit without a visitation thereof, the insufficiency was yet found probable by witnesses; but the tacksmen was preferred in the probation, that the houses were sufficient at his removal. Stair, 15th November 1676, Adamson *contra* Marshal.

Levior obligatio præsumitur.

A CONTRACT being made betwixt a woman on the one side, and her mother and stepfather on the other side; after the husband's decease, the Lords refused to cause registrate the contract against his heirs, because the mother and her husband, by the contract, being

bound to give to the daughter a sum, in lieu of all she could crave as bairn's part of gear, he was thought only to be bound *tanquam maritus*, and for his interest, and not *principaliter*. Colvil, Spotiswood, (*Husband*) January 1583, Allardice *contra* Erskine and Ramsay.

AN obligation to pay a certain sum yearly, was found to be perpetual and not restricted to a liferent, tho' heirs and assignies were not express'd. Here there was some slender evidence, that the principal sum effeiring to that yearly annualrent was due, and was the cause of granting the obligation, tho' through unskilfulness omitted to be mentioned. Stair, 2d February 1667, Powrie *contra* Dykes.

ONE of three persons bound conjunctly and severally in a bond, paid the same, and took a discharge in name of all the parties concerned in the bond; thereafter having torn his own name from the bond, and that of one of the other co-debtors, he insisted against the third for a proportional relief; the Lords sustained the following circumstances to infer a presumption that the pursuer was the principal debtor, and the other two only cautioners. *1mo*, Had there been any view to a relief, instead of an absolute discharge he would have taken a discharge and assignation. *2do*, Taking his own name from the bond, and much more that of the other *correus*, shows, that he considered himself as principal debtor, especially since it does not appear the other *correus* paid in his share. Forbes, 10 December 1709, Waddel *contra* Douglas. — An heretable bond being granted by an heiress, and her husband for his interest, conjunctly and severally, with a precept of sasine in her lands only; and thereafter, upon the creditor's advancing to the husband another sum, he, with consent of his said spouse, having granted security in his proper estate for both sums, narrating the same to have been advanced to the husband and his Lady; the Lords found, That the heretable bond was principally and originally the Lady's debt, and did affect her estate and representatives. Forbes, 13th January 1709, Ld. and Lady Airth *contra* Hamilton.

Other Presumptions.

Semel baro, semper baro. **SEME**L baro, *semper baro*, is only a presumption *nisi contrarium probetur*. Durie, 8th July 1628, Dunbar *contra* Lesly. Stair, 26th February 1663, Cuthbert *contra* Monro.

Eases when
presum'd got
by a trustee?

A FRIEND of a family, which was reduced to low circumstances, having undertaken to lay out his money and pains in compounding the family debts, and having accordingly compounded a great number; in a compt and reckoning betwixt the heir of the family and the trustee's heir, a proof was led, which fixed the eases that were got upon several of the debts; and the question being, What rule should be followed as to the debts about which the proof was silent? It was argued for the trustee's Heir, That his charge was the total debt acquired, unless where a direct proof was made out of the ease. It was pleaded on the other hand, That seeing the trustee failed to do his duty by expressing the transacted sum in the conveyance, mentioning only a certain sum in general, in order to avoid discovery, every thing ought to be presum'd against him, and he ought to have no claim upon account

count of any debt purchased in by him, further than he can instruct he paid; the Lords found it presumed, That eases were obtained of all the debts purchased in, and because these debts were of several sorts, some heretable and some moveable, some better some worse secured, they found, That the rule for fixing the eases must be to take a *medium* of what is proved to have been got upon debts of the same kind. January 1735, Captain Chalmers *contra* Sir James Cunningham.

ANDREW ALVES indorsee to a bill of exchange, drawn, by Scot of Harden, upon, and accepted by one Brown, having charged for the sum, the acceptor obtained suspension upon this ground, That the bill was accepted by him as the grassum of a tack, which Harden had agreed to set to him of certain lands, and which tack Harden refused to implement, having set the lands to another, and therefore the bill was void, *causa data, causa non secuta*; that there was a legal presumption, that Alves the indorsee was in the knowledge of this fact, being Harden's factor at the time, overseer of all his affairs, an especial branch of which, was setting of tacks, and overlooking the tenants; so that, *est*, he were an onerous indorsee, he is not presumed to have *bona fides*: The same objections were found competent against Alves the indorsee which would have been relevant against Harden. January 1729, Alves *contra* Brown.

Factor presumed to know his constituent's transactions,

IN a reduction upon minority and lesion, the defence was, That, in the bond, the pursuer expressly acknowledged himself to be major, & *deceptis non decipientibus jura subveniunt*, the presumption was here found to ly, That this was *ex proprio motu* of the minor, unless he offered to instruct that he was induced to insert this clause, or that the charger knew that he was minor. Stair, Gilmour, 23d February 1665, Kennedy *contra* Weir.

Minor affirm-
ing himself
major, by
whose instiga-
tion presumed?

A PARTY having sign'd a bond, without designing himself in the paper, the Lords found, That there being many others of that name and surname, the pursuer must prove the defender to have been the subscriber of the bond, which the defender still denied. Newbyth, 15th November 1665, Miln *contra* Murray.

Not presumed to be the subscriber, unless designed.

TOCHER stipulated by a third party, when presumed paid? See Husband and Wife.

WIFE accepting a right to a part of her legal provision, is understood to pass from the remainder. See Implied Discharge.

PRINCE OF SCOTLAND.

THE principality of Scotland, which belongs to the King's eldest son, belongs to the King himself *jure proprio*, while there is no Prince existing, and not as administrator for an heir *in spe*. Stair, 9th January 1680, Purves *contra* Ld. Lufs.

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LANDS

LANDS belonging to the principality being alienated, the same was reduced, because disposed *simpliciter* by the King, without mentioning that he disposed as Prince. Balfour, (*Crown Rent*) 7th February 1537, the King *contra* Ld. Calderwood. --- The like with respect to a gift of non-entry of the Prince's lands. Haddington, 16th June 1608, Johnston *contra* Ld. Ricarton. --- And when there is a Prince existing, a disposition from the King of principality-lands, must expressly bear the King's title as administrator to the Prince, otherwise the disposition is null. Durie, 14th July 1626, Hamilton *contra* Vassals of Bargeny.

P R I S O N E R.

Who may
put diligence
in execution?

FOUND a sufficient defence to magistrates pursued for refusing to take in a prisoner, that the messenger who offered him, had been deprived by a sentence, or *separatim*, that there had been publication made of the deprivation. Durie, 25th July 1626, Smith *contra* Bailies of Northberwick.

Who may
be charged to
receive rebels?

BAILIES of burghs of barony, cannot be compelled to take a rebel, nor be charged for that effect. Durie, Haddington, 13th March 1623, Bailies of Dunse *contra* Mudie's Creditors. --- The common clause in letters, to charge magistrates of burghs, &c. was understood of burghs royal; and the other clause, to charge magistrates of land, to be understood of sheriffs, stewarts, &c. and therefore not to be extended to burghs of barony. Durie, 12th February 1624, Ld. Langtoun *contra* Magistrates of Dunse. --- Bailies to bishops or barons are not liable to execute charges of caption against rebels, unless they have a regality or some other greater jurisdiction than as bishop or baron-bailie. Durie, 21st March 1627, Earl Cassils *contra* Aitkin. --- Bailies of regalities are bound to receive rebels into their prison, as well as magistrates of a burgh royal are. Stair, Gosford, 7th July 1668, Hamilton *contra* Callendar.

Magistrate
who is not
bound to re-
ceive the re-
bel, is bound
to keep, if he
does receive.

THE magistrates of a head-burgh of a stewartry, having received a rebel, upon caption, into their tolbooth, who thereafter escaped; it was found, whatever might be said if they had refused to accept the prisoner, upon the pretence, that burghs within stewartries, by act of parliament, are not liable to keep prisoners, that this was not now competent. Stair, Gosford, 18th June 1670, Cheap *contra* Magistrates of Falkland. --- The like in a process against the baron bailie of Dunse. Fountainhall, 13th July 1694, Relict of Sir James Rothead *contra* Cockburn. --- The like. Marcus, (*Caption*) March 1685, Sir James Cockburn *contra* Nasmyth of Possó, where it was also found, That the baron was not liable, unless he had given warrant to the bailie to receive the prisoner. --- A messenger having refused to shew the caption to a magistrate, or other warrant to apprehend the prisoner; the Lords, in a subsidiary action for the debt, assilzied the magistrates, tho' they had accepted the prisoner, and kept him some weeks, but then

then pretended, that, being like to starve, they might liberate him, seeing the in-putter did not offer caution to aliment him. Fountain-hall, 28th February 1685, *Stevenson contra Manson*.

HE who charges a magistrate to take a rebel, must make offer to go foot for foot with him, otherwise the charge is null. Haddington, 18th June 1608, *Boid contra Moncrief*. --- After magistrates are charged upon the will of the letters of caption, commanding "all magistrates and messengers to take and apprehend the rebel," if they disobey, the old form was, to issue out letters of horning, bearing warrant for a new charge; and if this charge upon the horning was also disobeyed, then it was, and no sooner, that letters of horning in the common stile might be directed, containing a warrant to charge under the pain of rebellion, &c. upon this account a gift of a magistrate's escheat, was found null, which proceeded upon a charge of horning, without any previous charge upon another horning. Durie, 16th January 1622, *Ld. Drumlanrig contra Ld. Cathogil*. See Hope, (*Caption*) *contra Town of Linlithgow*.

Form of charging magistrates.

A SHERIFF being pursued to pay the debt for not taking a rebel (he being charged so to do) because he kept company with him divers times thereafter; the Lords found, That the charge given him, should make him liable thereto for a year and day after the date of the charge, and no longer. Durie, 13th, Spotiswood, (*Caption*) 14th July 1630, *Hay contra Earl Marischal*.

How long does the charge continue in force?

THE Lords sustained action against the bailie of a burgh, for suffering a prisoner to escape, altho' the party escaped after the bailie was out of office, except he would alledge, that he intimated the charge given to him to the intrant bailies. Hope, (*Caption*) 6th March 1622, *Frank contra Bailies of Peebles*.

Magistrate must intimate the charge to succeeding magistrates.

THE creditor is not bound to furnish assistance to the messenger, who, by the will of the caption, may charge all magistrates, in burgh or landwart, to take the rebel and incarcerate him; and therefore the want of assistance with the messenger, was found no defence to a magistrate, who suffered the rebel to escape. Stair, 20th February 1678, *M'Neil contra Bailie*.

Creditor not bound to furnish assistance.

A MAGISTRATE charged to take a rebel, was decerned to pay the debt, because it was proved, that the rebel had been in company with him divers times after the first charge. Haddington, 16th March 1622, *Scot contra one of the Bailies of Montrose*, *Nicolson, (Sheriff)* 5th December 1610, *Vause contra Ld. Calder*. --- The Lords sustained letters against a sheriff for not taking a rebel, because he saw him divers times after the charge, altho' the charger did not shew the rebel to him, nor offered to go foot for foot with him. Auchinleck, (*Sheriff*) 18th July 1628, *Watson contra Crichton*. --- It is relevant to free a magistrate pursued for the debt for suffering a rebel to escape, That the rebel had wounded those who were taking him, and escaped *vi majori*. Stair, 2d December 1664, *Wilson contra Home*. --- The magistrates being charged to concur in putting a caption in execution, were found obliged, without delay, to search any house within their

What diligence requir'd in apprehending.

town, that was particularly shown to them, unless they had been repulsed by force, or the doors by violence kept close against them. Stair, Gosford, 2d July 1669, Farquhar *contra* Magistrates of Elgin. — A bailie being charged by a caption to incarcerate the rebel, is obliged to do the same effectually by his personal concurrence; and therefore the negligence or collusion of the persons employed by him, is upon his peril. Stair, 20th February 1678, M'Neil *contra* Baillie. — Magistrates being once charged to take a rebel for a debt, are obliged at any time thereafter, without any new charge, to apprehend him if it be in their power, and it is presumed to be in their power, if they see him within their town, unless they qualify some impediment. Durie, 12th June 1630, Mowat *contra* Magistrates of Stirling.

Process against magistrates for not apprehending.

THE magistrates of a town being charged to apprehend a debtor under caption, are liable to pay the debt due to the charger, if they do not obey the charge, and may be pursued directly, even after the debtor's death, without any previous process constituting the debt against the debtor's heirs. Durie, 26th March 1634, Dunbar *contra* Provost of Elgin.

Offer to incarcerate, no relevant defence against this process.

A BAILIE of a burgh who takes not a rebel, being exhibited to him, is liable to pay the debt; and altho' the bailie thereafter take the rebel *post intervallum* and put him in ward, and that he there remain in as good condition as he was; yet that was found not to relieve the magistrate, because at the first he took him not, being in his power. Hope, (Caption) 14th July and ult. November 1622, Sibbald *contra* Blyth. — A magistrate taking a rebel upon a charge of caption, and suffering him to go free; in a pursuit against him for the debt, an offer to re-enter the rebel *cum omni causa*, was not sustained. Haddington, 24th June 1624, Inglis *contra* Bailies of Dunfermline.

Other defences.

IN a pursuit against a magistrate for not concurring to execute a caption, the Lords found the following defences jointly relevant; 1^{mo}, That when the defender's concurrence was required, he was necessarily taken up in ordering quarters for the King's troops which came to the town that evening. 2^{do}, That he offered the concourse of the town officers. 3^{tio}, That it was late at night when he was required. And, lastly, That the rebel was bankrupt before the charge, and he offered now to put him in prison in as good case as formerly. Stair, 13th June 1667, Antrobus *contra* Anderson.

Prisoner must be booked.

IN a pursuit against magistrates and the keepers of their prison, for suffering the debtor to escape out of prison; the Lords repelled the defence, That the creditor had neglected to book his debtor in the tolbooth books, this being the duty of the keeper, but reserved action of relief to the keeper against his servants for neglecting to book him. Fountainhall, 6th November 1683, Shaw *contra* Vanse and the Magistrates of Edinburgh. — The like. Durie, 24th January 1642, Smith *contra* Williamson.

Sheriff not answerable for the custody of prisoners.

THE Lords affoizied a sheriff from paying a rebel's debt, whom he had taken and put in ward in the head burgh of the shire, and the rebel had thereafter escaped; because, after imprisonment, the sheriff

functus

functus erat officio as to the rebel's escaping out of prison, unless he had been actor or accessory to his escape. Durie, 2d March 1627, Brown *contra* Sheriff of Wigton.

In pursuits against magistrates, for suffering a prisoner to escape, there is no difference, whether the rebel had been incarcerated upon the pursuer's caption, or, being there before, had been arrested; for in both cases magistrates are liable. Stair, 12th June 1666, Hay *contra* Magistrates of Elgin. — Prisoners for a crime may be arrested for a civil debt. Gosford, 28th July 1669, Grant *contra* Grant. — Arrestment of prisoners in the tolbooth upon caption, it is not a necessary requisite thereof, that it be intimated to the magistrates of the town. Stair, Gosford, 18th June 1670, Hay *contra* Magistrates of Elgin.

Prisoner arrested in prison at the instance of another creditor.

A MAGISTRATE, setting at liberty a party incarcerated for debt, will not evite payment thereof by re-entring him to prison; because the incarceration is a kind of punishment of his rebellion, and presumable that thereby he might have been induced to make payment, if he had not been eased by being set at liberty. Haddington, 23d July 1605, Nisbet *contra* Drummond. — The Lords sustained this exception, that three years running after the prisoner came out of ward, he remain'd in the same town, having his dwelling-place, and openly repairing to kirk and mercat there, during which time if the pursuer had challenged, the bailie would have re-enter'd him *cum omni causa*; but, by the pursuer's fault, he was not entered; for after the said delay of three years the party became insolvent and fled out of the country. Hope, (*De actionibus in factum*) 12th January 1615, Gray *contra* Malice. — A magistrate being pursued for the debt for suffering a prisoner to escape, it was not found a relevant defence to alledge, That the debtor being again found, was put into prison in as good condition as at first. Stair, 26th July 1670, Moncreif *contra* Magistrates of Perth. — Magistrates of a town being pursued for allowing their prisoner to go abroad frequently out of their tolbooth into the street and taverns, it was found no relevant defence, that the prisoner was always guarded; for the Lords were of opinion, That magistrates of burghs have only power to let prisoners come out of their tolbooth under a guard in the extreme hazard of their life by sickness, and not without testificates by physicians, or skilled persons upon oath, bearing the party's condition to require the same, and that without great hazard they could not suffer delay to make application to the Council or Session. Stair, 14th June 1671, Town of Brechin *contra* Town of Dundee. — A person in prison being sick, and having the same attested under the hand of a doctor of medicine, was allowed to be transported to a house in the town, upon caution, to be a true prisoner there, and to return to prison upon recovery. Haddington, 1st December 1609, Ld. Applegirth suppliant. — A magistrate suffering a prisoner for debt to ly out of the tolbooth, tho' he was *in extremis agens*, and died, was found liable for the debt, seeing he ought to have had a warrant from the Lords for that effect. Here it was proved, that formerly they had suffered him to ly several nights out of prison. Gosford, 14th July 1668, Paplay *contra* Magistrates of Edinburgh.

Magistrate must not allow the rebel to go out of prison.

Rebel escaping by breaking prison.

IN an action against magistrates to pay the debt for suffering a prisoner to escape, this exception was sustained to liberate them, *viz.* That the defender, by instruments of iron, in the night time, broke up the lintel of the prison window and escaped, and that the same night and next day they made search for him in the town and country. Durie, 21st November 1628, Lockie *contra* Bailies of Glasgow. — The magistrates of a town were found liable for the debt of a prisoner who escaped; altho' by the use of quicksilver he had opened the prison doors in the night time, because they could show no diligence in searching for him and recovering him. Durie, Auchinleck, (*Caption*) 14th November 1634, Brown *contra* Town of Inverness. — Magistrates found liable for the debt of a rebel escaping out of their prison, tho' he escaped by breaking through the roof, and they searched for him immediately after; seeing the escape was in day-light, during which the town officers should guard the prisoner. Stair, 23d November 1664, Hay *contra* Magistrates of Elgin.

Where escape is made by force or stratagem.

FOUND relevant to affoizlie magistrates for suffering a rebel to escape out of prison, that about six at night in the winter time, the keeper opening the prison door to let the rebel's Lady in, six or seven armed men press'd in with her, and there were 60 more at the gate. Stair, 25th January 1665, Baird *contra* Magistrates of Elgin. — In a pursuit against the magistrates of Elgin, out of whose prison a debtor escaped, it was alledged, That the prisoner escaped *vi majore*, in so far as on a Sunday, when the people were at church, the officer, keeper of the prison, opening a door, a woman cast a plaid over his head and pulled him to the ground, at which time the rebel escaped. This condescendence was not sustained; for the magistrates ought to have had their tolbooth better secured, than to be forced by one woman, neither was it a competent time to open the tolbooth upon Sunday when the people were at church, and could not concur in case of force. Stair, 5th July 1666, Hay *contra* Magistrates of Elgin.

Where by insufficiency of the prison.

A MAGISTRATE found liable for the debt of a prisoner who escaped, there being no catbands upon the outside of the prison door, nor outward chains locked. Stair, 11th February 1671, Will *contra* Town of Kirkaldy. — A prisoner for debt having got in some tools, whereby he escaped; the Lords found the magistrates liable for the debt, because they wanted catbands or chains on the prison doors. Fountainhall, ult. January 1699, Young *contra* Bailie of the regality of Falkirk. — Magistrates found liable for the debt upon a prisoner's escape, in respect the prison was not sufficient; for tho' there were catbands on the door, they were on the inside, to undo which the prisoner had ready access. 4th July 1733, Henderson *contra* Magistrates of Irvine.

Where the escape is *casus improvisus*.

A TOWN being about to repair their prison house, so that an old wall falling, and, in the rubbish, a prisoner being near overwhelmed, but, in the night-time, working himself out and escaping; the Lords found this a *casus fortuitus & improvisus*, and therefore affoizlied the town from the subsidiary action for the debt. Fountainhall, 13th February 1685, Binning *contra* Magistrates of Kirkaldy. — In a pursuit against magistrates for suffering a prisoner to escape, the Lords found the

the defence relevant, viz. That the prisoner escaped *casu improvise*, in so far as a troop of horse being lying in the town, who had the keys of the tolbooth where they kept guard, they, in a frolick on the King's birth-day, having caused the prisoner drink his Majesty's health, the rebel, in the disorder and confusion, escaped, but that the magistrates, within two or three days, after search, did apprehend and put him again in prison. Fountainhall, 14th December, 1687, Fendar *contra* Magistrates of Haddington.

SOME thieves being apprehended for breaking a warehouse, and carrying off some goods belonging to a merchant, and being thereupon imprisoned, and thereafter escaping, in a subsidiary action against the magistrates of the place, the Lords found, That no process could be sustained against the magistrates *subsidiarie*, till the pursuer's claim of damage were proved against the principal delinquents, seeing they could not be bound as accessories and *in subsidium*, till the principals were discussed. Fountainhall, 21st January 1704, Clerk *contra* Magistrates of Leith. — Where the debtor was only denounced for the principal sum, the magistrate was not found liable for the annualrent that fell due thereafter. Durie, 29th June 1626, Halyburton *contra* Provost of Jedburgh. — The Lords found, That the pursuer could crave no more but the restricted sum for which the prisoner was booked, tho' far less than the sum contained in the caption, without prejudice to the pursuer to insist for the superplus of the debt not booked as accords. Fountainhall, 11th November 1704, Blair *contra* Town of Edinburgh.

Process against magistrates for suffering the rebel to escape.

WHEN a prisoner escapes it is the burgh *principaliter* that is liable to the creditor, and the magistrates only as representing the burgh, unless where their own fault or negligence can be argued; upon this footing the present magistrates were found liable, tho' it was during their predecessor's management that the escape was made, without prejudice of their relief off the persons who were *in culpa*. Stair, 31st January, Dirleton, 1st February 1668, Paplay *contra* Magistrates of Edinburgh. — The like. Fountainhall, 26th July 1710, Hafwell *contra* Town of Jedburgh.

Burgh ultimately liable.

MAGISTRATES found liable for the debt, having set a prisoner at liberty upon a bare suspension, containing no charge to set at liberty. Durie, 25th June 1642, Wylie *contra* Bailies of Wigtoun. — The Lords were resolved, That where the sums did not exceed 200 merks, the goaler might enlarge prisoners, without any other warrant but the consent of the parties, at whose instance they were imprisoned, otherwise, that the prisoner ought to suspend and relax. *Here five of the Lords dissented, judging the vote to be somewhat arbitrary, and that thereby the Lords were taking upon them a legislative power to alter or qualify the premisses without an act of parliament, Gosford, 3d, Dirleton, 5th February 1675, Vanse supplicant.

Warrant of liberation.

Cessio bonorum.

IN a *cessio bonorum* the Lords, before answer, ordained the pursuer's oath to be taken, upon this defence, whether he did contract debt af-

Who must wear the dy-vour habite 3

ter he knew himself insolvent and bankrupt; and they resolved, if it was so found, they would not grant him liberty without sitting upon the dyvour stone and wearing the habite. Stair, 18th January 1662, Colquhoun *contra* his Creditors. ----- The Lords, upon a man's bill who had obtained a *bonorum*, and a testificate of divers persons of credit, that he had become insolvent upon the occasion of loss and ill debtors, and was otherwise virtuous, did dispense with that part of the decreet touching the wearing of the habite. Dirleton, 12th February 1675, Kinnier supplicant. ---- The like. Dirleton, 26th June 1675, Langlands supplicant. --- The pursuer of a *bonorum* having given her oath, that there was no fraudulent deed done since the disposition, wherein she had disposed *omnia bona*; the Lords refused, tho' it was pressed by the other side, to urge her to declare, that no deed had been done by her to defraud the creditors, whether before or after the disposition, because she had sworn in the terms of the ordinary oath given by the pursuers in that case. Dirleton, 3d July 1675, Key *contra* her Creditors. See act of sederunt, 8th February 1688.

Effect of a
cessio bonorum.

A DEBTOR, after having obtained a *cessio bonorum*, granted a bond of corroboration to one of his creditors, whom he called in the process of *cessio bonorum*, and he being again incarcerated upon this new bond, the Lords found, That the granting this corroborative security, where the debtor consented to the creditor's doing diligence, was passing from the *cessio bonorum* as to that debt, and therefore refused to liberate him from prison, leaving him to insist in a new *cessio bonorum*. Fountainhall, 20th January 1693, *contra* Graham.

Hurts not
the diligence
of creditors.

In a competition betwixt an arrester and another creditor, who alledging, That the common debtor having taken the benefit of a *cessio bonorum*, and assigned all in favours of his creditors in general, the arrester could not be preferred to the rest, but behoved to come *in pari passu*; the Lords repelled the alledgeance, because they thought the assignation could not prejudice the arrester as to his diligence, which he had used before, the *cessio* being only for the debtor's own behoof, and so could not put the creditors in a better or worse case than they were in before. Spotiswood, (*Cessio bonorum*) 22d November 1628, Wilson *contra* Ld. Drumlanrig.

Suspension
upon a disposi-
tion *omnium*
bonorum.

A PARTY *obcratus* craving suspension against several of his creditors, on this reason, That he had made a general disposition *omnium bonorum* in their favour of all his estate; upon which most of them had given him a *superfedere*: But these against whom it was craved not having accepted the disposition, nor benefited by it, nor consented to the *superfedere*, and only juratory caution being offered, the Lords, on two such applications by different debtors in one day, thought this a protection on the matter, and therefore refused both the bills. Fountainhall, Scot and Cornwall supplicants *contra* their creditors. --- A bankrupt obtaining suspension against all his creditors as to personal execution, upon consignation of a disposition *omnium bonorum*, and making faith at passing the suspension, That he had not done any fraudulent deed in prejudice of his creditors, conform to the act of sederunt touching juratory caution; yet he being thereafter charged by one of his creditors, and suspending upon that reason, the Lords repelled

pelled the reason, and found him liable to personal execution, notwithstanding the consigning a disposition to his estate. Home, November 1686, Balfour *contra* Bruce. — A debtor *obærat* insisting in a suspension against his creditors, upon this reason, That he was willing to put them in possession of his whole effects; the Lords being dissatisfied with general suspensions, thought of referring him to pursue a *cessio bonorum*, but afterwards remitted to the Ordinary to pass suspension against all such creditors as were in possession, for they thought it hard they should both have his land and his person; but gave these creditors their option, either to continue in possession, or quit the same, and take themselves to personal diligence. Fountainhall, 13th February 1694, Watson *contra* his creditors. — But it will be no protection to a debtor, that his estate is sequestered and a factor appointed. Fountainhall, 13th December 1694, Darleith *contra* Bruce of Kinnaird.

Act of Grace.

THE act of grace having been made upon the application of the royal burrows, who were burdened with the entertainment of poor prisoners, and the words being, *That in case the creditor declined to aliment the prisoner, it should be leifum to the magistrates to liberate him*, which is neither command nor injunction, but merely permissive and discretionary; therefore the Lords thought the magistrates might renounce the privilege of this act of parliament introduced in their favour, and that it was a discretionary power, which they might use or not as they pleased. Fountainhall, 28th December 1710, Durham *contra* Glaswell.

The privilege is in favour of magistrates.

THE Lords found magistrates obliged by the act 32, parl. 1696, either to modify an aliment to a prisoner for debt within the description of the statute, payable by the party that did incarcerate him, or to aliment him themselves so long as they detain him in prison. Forbes, 20th February 1713, Grierson *contra* Magistrates of Dumfries.

Magistrates must modify an aliment to be paid by the creditor, or aliment the prisoner themselves.

IN a question about aliment craved by an indigent prisoner from his creditor, it was objected, That he was already sufficiently alimented, by being on the exchequer charity-roll for *L. 15 Sterling* yearly. Answered, This is *jus tertii* as to the creditor, who can plead no *jus quæsitum* upon that score; and were the prisoner craving to be set at liberty upon a *cessio bonorum*, it would not include the King's bounty. The defence was repelled. 24th July 1734, M'Kenzie *contra* Blair. — But upon an after-application, 20th November 1734, this interlocutor was altered, and the defence sustained.

What if the prisoner is otherwise alimented?

THE Lords, on a prisoner's complaint against the magistrates and the party for refusing to aliment or set him at liberty, finding the ground of his imprisonment not to be a debt, but a fact prestable by himself, they refused to modify any aliment, or to set him at liberty, till he first exhibited the papers he had in his hands. And this by example (says the author) of the abbay, which tho' a sanctuary for debtors, yet if a man be decerned for exhibition of papers he has no privilege,

Aliment refused where the imprisonment is upon a *factum præstandum*, or upon a delict.

privilege, but the bailie of the abbay may expel him, till he obey the will of the charge and produce the papers. Fountainhall, 2d December 1709, Ross *contra* Turner. — A party, upon a complaint of a gross delict, being decerned for a certain sum in name of damages and expences to the complainer, and ordained to be carried to prison there to remain for a certain time, and thereafter until payment, did apply for a liberation upon the act of grace; the Lords were of opinion, that the words of the act of parliament, (*Civil debts*) were to be understood of debts arising *ex contractu*, *aut quasi contractu*, in opposition to debts arising *ex delicto*, and that therefore not only were penalties, properly so called, imposed for crimes, excepted from the benefit of the act of parliament, but that all damages arising *ex delicto* are comprehended under the exception; and in the reason of the thing, it was just, the benefit or privilege should only have been indulged to such as were *lapsi* by misfortunes in the course of their business, and not to criminals; and therefore they refused the desire of the bill. 23d November 1738, William M'Leslie supplicant.

Form of proceeding upon the act of grace.

A PRISONER having complained to the magistrates of the burgh where he lay in prison, and made faith, That he was not able to aliment himself, upon which an instrument was taken in his name, and intimation thereof being made to the creditor, by shewing him the first instrument, and requiring him to aliment the prisoner, or consent to his liberation, upon which an instrument was taken against him also in name of the said prisoner; and the creditor having made no offer to aliment within 10 days thereafter, the Lords found, That the magistrates had warrantably dismissed the prisoner, altho' none of the instruments above said bore any intimation to the creditor by the magistrates, or by their procurator, or by any person in their name, to aliment the prisoner, but was only taken in the prisoner's own name; and here was no intimation to the creditor previous to the prisoner's deponing that he was not able to aliment himself, nor yet was the prisoner's oath advised, and he found to be poor by sentence of the magistrates. Forbes's MS. 8th July 1714, Bogle *contra* Bailies of Hamilton. — A debtor being imprisoned by a factor, the creditor himself being out of the country, and having applied for the benefit of the act of grace, intimation to the factor in this case was found sufficient. Fountainhall, 28th December 1710, Durham *contra* Glaswell. — After intimation made to the creditors in terms of the act of grace, if the debtor be arrested in prison by another creditor during the running of the 10 days, or after elapse thereof, there is no necessity of a new intimation to him; but in terms of the *penult* clause of the act, he must find instant security to aliment, otherwise the prisoner may be set at liberty. 27th January 1736, Thomas Dowie *contra* Crockat.

If the prisoner must grant a disposition?

THE question occurring, whether the magistrates should oblige the prisoner before he came out, to dispoise all his effects in favours of his creditor imprisoner, as is done when a party craves suspension on jutory caution, there being no reason that he against whom there is ultimate diligence by caption should give less security than he who is only charged with horning; yet the act not adjecting any such quality, the Lords refused to burden the liberty with a disposition, but left it to the magistrates to require it, if they thought fit, and in Edinburgh, the

the author says, it is always exacted. Fountainhall, 28th December 1710, *Durham contra Glaswell*.

Two men who had been sentenced to stand on the pillory for signing as witnesses to a paper, (which was afterwards found a forgery) without seeing the party subscribe, or own his subscription, having undergone their punishment, and being ordained to be set at liberty, but still detained by the keeper of the prison for his dues; the Lords thought it was a private right and perquisite of his office, which he could not be deprived of. Fountainhall, 14th June 1712, *Rutherford and Gray supplicants*. — Whether a prisoner, who offers a *cessio bonorum* to the goaler, can notwithstanding be detained for the prison dues, or if the goaler is comprehended under the act of grace in common with other creditors, debated, but not determined. February 1733, *Joseph Home contra* the keeper of the tolbooth of Edinburgh. — A poor prisoner having obtained an act of liberation upon his creditors refusing to aliment him, was notwithstanding detained by the goaler, upon pretence that his fees were not a debt that fell under the act of grace, and that he had a hypothec upon the prisoner's person for payment of the same; the Lords found, That the goaler must aliment or liberate. 18th July 1734, *Hay contra* Keeper of the tolbooth of Edinburgh. — The like found, 5th January 1736, *Ratray contra* Keeper of the tolbooth of Edinburgh. 13th December 1737, *Hopkins contra Cleland*.

Goaler fees subject to the act of grace.

A PARTY being imprisoned upon a caption for a civil debt, and having deponed in the terms of the act of parliament, that he was not able to maintain himself, and being set at liberty because the creditor declined to aliment him; the Lords found, That he could not summarily be recommitted to prison by virtue of the same caption, but only by warrant of their Lordships, *causa cognita*. Forbes, 10th December 1709, *Law contra White*.

A party set at liberty upon the act of grace, cannot be recommitted upon the same diligence.

WHAT relief competent to magistrates paying the debt. See Debitor and Creditor.

PRIVILEGED DEBT.

THERE being necessity of a defalcation from off every one's debt, because the whole exceeded the gear; the Lords preferred the poor of a kirk to have their whole sum without defalcation, as being a privileged debt. Spotiswood, (*Creditor*) Durie, 20th January 1631, *Brown's creditors competing*.

Poor's money;

A RELICT for implement of her contract of marriage, had formerly a preference to all other personal creditors, tho' the other creditors had done more diligence. Stair, 8th February 1662, *Crawford contra Earl Murray*. Durie, 20th January 1631, *Creditors of Brown competing*. Auchinleck, (*Wife*) 27th March 1627, *Cranston contra Home*. Auchinleck,

Relict's provision in her contract of marriage.

chingleck, (*Wife*) 11th July 1631, Lady Yester *contra* Ker. Auchingleck, (*Wife*) 22d July 1631, Mack *contra* Parbon. Gosford, 14th November 1672, Smeton *contra* Executors of Dunlop. — But the Lords afterwards found, That wives have no preference on their contracts of marriage, but conform to their diligence; and that the *jus hypothecæ* they had by the Roman law, was not *pro donatione propter nuptias*, but only *pro restitutione dotis*. But this unfavourable interlocutor for widows (says the author) was stopt on a bill till further hearing, and there is no more about this case in his collections. Fountainhall, 17th February 1688, Keith *contra* Keith. — A relict has no preference to her husband's other creditors for the provision in her contract of marriage, but according to the priority of her diligence. Dalrymple, Forbes, 19th February 1713, Allan *contra* Creditors of Cleghorn. Dalrymple, 24th, Forbes, 25th June 1714, Creditors of Lindsay competing.

Disposition
of moveables,
with the bur-
den of debts.

A HUSBAND disposing his moveables to his wife, with the burden of all his debts, and with power to alter; the husband's creditors, after his death, were preferred to the wife's creditors upon the subjects disposed; for tho' there can be no casual hypothec, or real burden upon moveables, yet the clause was found to import, that a husband's debts were to be privileged and preferred *primo loco*. Gosford, 8th, Stair, 17th December 1675, Creditors of Masterton *contra* Creditors of Thin.

Medicaments
and funeral
expences.

DRUGS furnished to a defunct while on death-bed, and his funeral expences, are both privileged and preferable to the defunct's other debts, Stair, Dirleton, 16th December 1674, Ld. Kelhead *contra* Irvine. — A man having died a little after his wife, in a competition betwixt the chyrurgeon, &c. and the man's creditors; the Lords first found the wife's funeral charges a privileged debt as well as the husband's, she having deceased before him; but on a new hearing their Lordships altered, and found the wife's funeral expences, but of the nature of an ordinary debt, privileged indeed on her own estate, but not against her husband's creditors. Fountainhall, 19th February 1697, Auchingleck *contra* Creditors of Dinmuir.

Servants fees.

SERVANTS are privileged creditors for the year's fee current at the defunct's death, unless instructed that they were only feed for half a year, in which case they are only preferred for a current term. Stair, 25th November 1680, Crawford *contra* Hutton. — Servant's fees are so far privileged, that they may warrantably be paid before confirmation or dissolution of the family, to free the executors; but not being paid, they were found no privileged debts. Gosford, 24th November 1675, Neish *contra* Relict and creditors of Masterton.

Aliment of
the family till
the term.

ALIMENT of a common debtor's family till the next term after his decease, was found not to be a privileged debt to give any preference to the creditor in a confirmation of the defunct's moveables in prejudice of his other creditors. Dalrymple, Forbes's MS. 23d February 1714, Creditors of Lindsay *contra* his Relict.

ONE having entred wines and sold them, in a competition betwixt ^{Publick taxes.} his creditors arresters of the price, and the King for the duty, the Lords preferred the King. Durie, 10th June 1631, Peebles *contra* Scot.

P R I Z E.

A SHIP bought from the captor, and brought into a harbour, was found lawful prize, and the buyers not bound to restore her. Maitland, 6th July 1558, a Dutchman *contra* Lindsay. — Yet a ship being taken, and her crew put in by the pyrate into another vessel, the said crew, who were prisoners, mastering the ship and bringing her off, this ship was found no prize, but to pertain to the ancient owners; nor were there any damages allowed, but only an accompt of expences ordained to be given in before answer. Maitland, 14th May 1566, a Frenchman *contra* some Scotsmen. — A frigate under the King's pay having defeated a rich privateer, who had made prize of a French ship, and another ship in the mean time coming up and seising upon the French ship; it was found, That this capture was injurious otherwise than to assist the first attacker, unless it were proved, that the French ship would otherwise have escaped if he had not been thus seised upon. Stair, 15th February 1677, King's advocate *contra* Rankin. — A French privateer who took a Scots ship, pillaged a quantity of goods out of her, and robbed the skipper of some guineas, and also got a ransom paid, having continued upon the coast of this kingdom, till taken about 10 days after by the Commander of one of our own war ships within the bounds of his cruize, which recovered the money and goods aforesaid; the Lords found, That the property of such money and goods as were not contained in the ransom-bill, did remain with the persons from whom the privateer took the same, and that his captor was liable in restitution to them. Forbes, 13th February 1713, Stewart *contra* Collier. — Thereafter in the same cause, and with respect to the ransom-money, which was the other point in question, the Lords found the said ransom-money still to belong to the persons from whom the privateer received it. Forbes's MS. 16th February 1714, *inter eosdem*.

P R O C E S S.

Libel.

IT being objected against a summons of sale of bankrupt lands, that it had not past by bill, & *ex deliberatione*, &c. tho' the custom ^{What summons past upon bill.} seems not to require it, but the analogy of form does; the Lords considering the hazard it might bring on many bygone purchasers at rous if this were sustained, repelled the nullity, but wish'd there might be some regulation to correct this abuse in time coming. Fountainhall, Forbes, *ult.* December 1709, Wedderburn *contra* Nicolson.

VOL. II.

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What summons require to be continued?

A PROCESS for delivery of an obligation, conform to a backbond, obliging the defender to deliver up the same, in case he did not fulfil certain conditions, was sustained upon the first summons, without necessity of continuation. Durie, 8th November 1626, Prestongrange and Dick *contra* Hamilton.

SUMMONS to make arrested goods forthcoming needs not be continued, albeit they receive probation, no more than contraventions accessory to an act of lawburrows, violent profits accessory to a removing, or special declarator after a general. Haddington, 23d June 1612, *contra* — Summons of continuation found not necessary in a process of forthcoming, tho' the arrester had no other proof of the debt but by the defender's oath. Durie, 18th June 1628, Purves *contra* Purves. — In an action for making arrested sums forthcoming, the Lords found, That the summons behoved to be continued, seeing they were not past by a special privilege of the Lords to be without continuation, albeit they were accessory to the Lords anterior decret against the principal debtor, which they found to be a ground to have granted the privilege of not continuation, if it had been desired by a bill at the raising of the summons, but not being demanded, they found, *quod non inerat de jure*. Stair, 28th November 1665, Bruce *contra* Earl Morton.

DECLARATORS of Property, being of great consequence, ought to be continued, tho' instantly verified by writ. Stair, 22d November 1672, Strachan *contra* Burnet.

A DECLARATOR of bastardy may proceed upon the first summons *in favorem fisci*, tho' neither instantly verify'd by writ or by presumption. Stair, Gosford 15th June 1670, Livingston *contra* Burns.

SUMMONS of declarator of escheat of *a felo de se*, were found to need no continuation, especially where trial had been taken of the fact upon the dead body by an inquest. Haddington, 7th June 1598, Johnston *contra* Dobie. — A declarator of liferent-escheat requires continuation, because the superior, if a subject, must prove that the lands hold of him. Durie, 22d November 1621, Ld. Muckhall *contra* Stewart. — But if he produce his own infeftment of the lands libelled, this will save continuation. Durie, 24th March 1632, Ld. Lochinvar *contra* Lindsay. — A special declarator being subsequent to a general, needs not be put under continuation, albeit it consist *in facto*. Haddington, 29th June 1610, Ld. Kilbirnie *contra* Dick.

THE Lords refused to sustain a process of aliment, because it required a term to prove, and yet contained but one dyet; for tho' the act of parliament allows alimentary actions to be summarily discussed, it dispenses not with the days of citation, or the number of them. Forbes, 13th July 1705, Oliphant *contra* Oliphant.

Diets of compearance.

SUMMONS found null, the citation not being within year and day; for the summons, which is the warrant of the citation, bore to cite the defenders to compear the day of next to come. Stair, 22d July 1665, Rew *contra* Viscount of Stormont. — The Lords found, That after year and day the instance perisheth, and the summons cannot be continued, because the stile of summons is, *to compear the day of next to come*, which imports that the day of compearance must be within the year, and consequently the continuation.

tinuation. Falconer, 7th November 1684, Belches *contra* Earl of London. — The Lords refused to sustain process upon a summons, wherein the first day of compearance was beyond year and day of the raising of the summons, altho' the same was executed within the year. Forbes, 3d July 1711, Brown *contra* Carstairs. — In executions of summonses, the day of compearance for the first diet must be within year and day of the citation, and it is sufficient if the day of compearance for the second diet be within year and day of compearance for the first diet, and therefore a summons was sustained, tho' the day of compearance for the second was made to be more than year and day after the citation. Forbes, 15th July 1709, Baillie *contra* Menzies.

THE Lords allowed a pursuer, who inserted in the summons days of compearance that fell within Christmas vacation, to amend the wrong days filled up. Forbes, 23d June 1713, Colquhoun *contra* Ld. Newmains. — Citation to appear on a day of the vacation time, was sustained, where the party had the full number of days allowed by law for his appearance, in respect the citation, bearing with continuation of days, is understood to be the next lawful day thereafter. Forbes, 23d July 1713, Gordon *contra* Campbell.

A SUMMONS not called within year and day after elapsing of the last diet of compearance, falls and cannot be wakened. Forbes, 27th July 1708, Drummond *contra* Stewart.

IN a declarator of astrictio, the question occurred, how far the neglecting to call the heretor of the servient tenement, is supplied by his appearing, fisting himself as a party, and litiscontestating; the Lords were of opinion, That however a man's appearing for his interest may give ground for a decret of preference against him, yet where he is not called, and no conclusion against him, his appearing in the process is no sufficient foundation for a personal decerniture against him. 4th January 1740, Wedderburn of That-Ilk *contra* Town of Dundee.

CUMULATIO *actionum* was found not to be inept, where the conclusions of the libel, tho' of a different nature, (*viz.* restitution of spuilzied goods, and to desist from molesting of lands) did proceed from one and the same fact. Colvil, November 1582, *contra*

AN action against a defender for making up a charter cancelled by him, and also to refund the profits of the lands since the cancellation, was sustained, tho' both in one libel together, and no necessity found first to pursue the making up, and then for the mails and duties. Durie, 19th March 1629, Herries *contra* Lord Herries.

AN action to see a cancelled contract made up, and concluding also reduction and improbation, was sustained, tho in one summons. Durie, 18th December 1629, Lawson and Reid *contra* Earl Lothian's heirs.

DECREET being recovered against a party, and arrestment laid on thereupon in his debtor's hands, another decret, at the instance of the pursuer's heir, transferring the title *active* in him, and, in the same sentence, decerning the party in whose hands the arrestment was used to make forthcoming, was found null, because they ought to have been

done by two several pursuits, and two decreets; for if confusion of diets be a cause to annul proceedings of inferior judges, far more the confusion of sentences. Durie, 23d February 1628, Nasmith *contra* Ruthvens.

PROCESS sustained to crave the lands to be adjudged upon a renunciation to be heir, and the defender also to be decerned for bygone rents, intromitted with by him, both in the same summons. Durie, 19th December 1638, Corser *contra* Durie.

A CONSTITUTION and adjudication sustained in one summons. Stair, 26th July 1676, Boid *contra* Boid. — As also a decret *cognitionis causa*, and adjudication. Fountainhall, 16th July 1678, Courtie *contra* Stevenson.

IN a reduction of a disposition upon the act 1621, the Lords sustained a conclusion of forthcoming in the libel of reduction, the pursuer having formerly arrested the goods disposed. Home, February 1687, Chaplain *contra* Hamilton.

Decreet reduced, in what cases allowed to supply the place of a new libel?

THE Lords allowed the charger upon a decret that was reduced upon nullities, to insist *tanquam in libello* for his claim in the same process. Forbes, 27th June 1705, Stewart *contra* Baillie and Robertson. — A bill being unwarrantably protested and registred, even after six months; the Lords refused to suspend the letters *simpliciter*, but turned the decret into a libel, and found, That there was no necessity of a new libel. Bruce, 30th July 1715, M'Ready *contra* Crawford. — A process of molestation, commenced before an inferior court, may, after advocacy to the Lords of session, be turned to a process of declarator of property. Durie, 21st December 1633, Ld. Weym *contra* Stewart.

What Writs must be produced *ad fundandam litem*?

AN executor pursuing for the bygone rents of lands, must produce the defunct's title. Durie, 18th January 1628, Seaton *contra* Seaton.

IT was found not competent to an heir, pursuing for a debt of his predecessor's, to refer to the defender's oath, That he, the pursuer, was heir served and retoured, but it was found necessary for him to produce the retour. Durie, 3d July 1628, Maxwell *contra* Livingston.

IN a removing against tenants at a Lady tercer's instance, the kening was found sufficient to instruct this pursuit, without necessity of producing the service; and this from analogy of a *safine*, which is sufficient, without producing the charter. Durie, 18th March 1630, Lady Maxwell *contra* Tenants.

THE assigney to a tack of teinds, pursuing upon his assignation, will get process upon production of his assignation, albeit he produce not the tack *in initio litis*, but may prove it *cum processu*. Haddington, 7th July 1610, *contra*.

A PURSUER of a reduction *ex capite inhibitionis*, must produce the grounds of debt upon which it proceeds, tho' the inhibitor have also comprised upon the same debts before the infestment, to be reduced. Durie, 6th March 1639, Sir James Stewart *contra* Gordon.

THE

THE Lords found, That the production of a superior's sasine, without the charter, could not give him interest to pursue vassals for services whereof he was not in possession. Auchinleck, (*Vassal*) 20th January 1632, Campbell *contra* Calder's Vassals.

THE horning not necessary to be produced in a special declarator of liferent-escheat, after the general declarator is obtained. Durie, 10th February 1627, Donatar of Stewart's liferent *contra* debtor. — In a declarator of escheat upon a horning against a magistrate, for not taking a rebel whom he was charged to apprehend; the donatar was not obliged, in this instance, to produce the preceeding letters and charges, which were the warrants of the horning, he being a stranger; and therefore not presumed to have them, without prejudice to the defender to reduce thereupon *pro ut de jure*. Spotiswood, (*Horning*) Durie, 11th July 1628, Dunbar *contra* Mudie.

IN a subsidiary action against magistrates for not taking a rebel, the pursuer contending, That he was not bound to produce the horning against the said rebel (altho' it was the foundation of the caption against the magistrates) seeing the disobedience to the charge of caption was the foundation of this action, and therefore sufficient against them, who ought not to dispute if there was horning or not, seeing the judge saw the horning before he granted caption thereupon, and it was not their part to enquire any further, but to obey; this was repelled, and the horning ordained to be produced. Durie, 6th July 1624, Bailies of Kilrinny *contra* — An assigney to a bond having incarcerated the debtor, who, thereafter, escaped, pursued the magistrates for the debt; found no process till the assignation was produced, tho' the caption was at the assigney's own instance. Durie, 31st January 1632, Redick *contra* Maxwell.

IN a suspension, the Lords ordained the charger to produce the decret, whereupon the charge was given, and found, That the judge his precept thereon satisfied not the production in a suspension, altho' the sum was but L. 50 Scots, or thereby, and altho' there was no reason in the suspension levelled against the decret, only the suspender alledged, That if it were produced, he would eik some nullities against it. *Nota*, Durie here says, That this was not usually done, and that, in small sums, the practice was to produce no more but the precept; only, in the present case, the Lords declared, That, if after production of the decret, the letters should be found orderly proceeded, they would modify greater expences against the suspender. Durie, 16th June 1627, Dickson *contra* Achanay.

IT being objected against an adjudication, That, tho' it was deduced upon a debt, which came through several hands to the pursuer, yet the whole progress was not produced in the process of adjudication, so that, for want of several midcouples, it could not appear the pursuer had any right to the debt; the Lords, in respect the whole progress was now produced, refused to reduce the adjudication *in totum*; but restricted the same to a security for the principal annualrents and necessary expences. 20th December 1722, Duke Argyle *contra* M'Quorquadaile.

Steps of Procedure necessary in all Processes.

The judge ought to pronounce a distinct interlocutor upon the relevancy of the libel and defences.

A COMMISSARY's decret was reduced, because the libel being referred to oath, and divers defences given in by the defender's procurators, they were neither repelled nor admitted, nor was there any minute bearing litiscontestation to have been made; and this, altho' the defences were no way relevant, but, in effect, a denial of the libel, which was referred to oath, as said is; yet the Lords found, That the judge ought formally to have given his answer to the defences, and repelled them, and admitted the libel by his signature. Durie, 6th February 1633, Home *contra* Home.

The pursuer must prove his libel, and it is not sufficient that the defender neglect to deny the libel.

A BARON having conveyened and decerned his tenant in his own court for bygone terms, as also in damages for riving out ground, &c. and no probation being led, but only the party present, and not contradicting nor objecting; and, in supplement of this decret, taking another decret against him before the sheriff, where no probation was taken but the baron's decret; the Lords reduced both the decrets as without probation, and reponed the tenant to his defences. Fountainhall, 28th December 1708, Philip *contra* Menzies. — Found, That a pursuer ought to prove his libel, tho' not expressly denied by the defender: And a decret was turned into a libel, because the libel, on which it proceeded, was not proved, albeit the defender did not positively deny it in his defence, seeing his procurators did not expressly acknowledge it; and the *ratio* was, because the defence, denying the libel, is a thing of course, which clerks often forget to mark, or the defender's procurators to make. Marcus, (*Decrets*) March 1682, Prestongrange *contra* Sir John Sinclair of Longformacus. — The like. Fountainhall, 3d November 1709, Johnstons *contra* Johnston.

Decret must be put in the minute-book.

THE Lords refused to sustain it as a reason to reduce a decret of ranking, that after the date thereof, the interests of some creditors were taken in and ranked, without putting up a new decret in the minute-book, in respect that by the taking in and ranking of these interests, there was no new scheme or class made in the said ranking, but they were only join'd to the classes of the creditors formerly ranked. Forbes, 20th January 1714, Lockhart of Carnwath *contra* Creditors of Kersewell.

Contumacy.

A PERSON being pursued for a bloodwit, at the instance both of the procurator-fiscal and the party wronged; and being fin'd only for contumacy, this fine was found to belong to the judge alone, and that he might discharge the same after sentence; for the Lords found, That the judge might have tried the fact, altho' the party compeared not, and might have punished him, and appointed satisfaction to the party hurt; but no trial being taken of the fact, no censure could pass upon the party for the same, so that the pain being for contumacy only, no part thereof could belong to the complainer, who might pursue for damage

damage and interest, notwithstanding of the foresaid sentence. Durie, 26th November 1633, Lindsay *contra* Fairfoul.

Holden as confessed.

A DECRET at the instance of executors, holding the defender confessed, upon a promise to pay a debt due to the defunct by another, was reduced, upon this ground, That the bond granted by the principal debtor was heretable, and therefore the executors had no right to pursue for it, and the defender might, *impune*, neglect to appear when the pursuer had no right, albeit it was alledged, That the same persons who were executors were also served heirs to the defunct, which the defender was not bound to regard, seeing the pursuit, as said is, was at their instance *qua* executors. Durie, 2d July 1628, Wilson *contra* Hay.

What if the pursuer has no title in his person?

IN a pursuit against a pupil and his tutor for mails and duties, the quantities being referred to the tutor's oath, he refused to depone; it was found he could not be holden as confessed, not being the party, but conveyed *qua* tutor, but that he might be forced to depone by horning and caption as other witnesses. Stair, 27th June 1665, Cant *contra* Loch.

Who may be holden as confessed?

A MAN twice summoned, personally apprehended by a messenger, to give his oath of calumny, and not comparing, was holden as confessed, without any other adminicle or supplement of probation. Haddington, 2d December 1609, Ld. Airth *contra* Lord Elphinston. — The Lords refused to hold defenders as confessed, who were summoned to give their oaths by the summons of continuation until they were of new summoned. Hope, (*Probation by oath*) 28th March 1616, Ld. Balmanno *contra* Parishioners of Forden. Hope, (*Probation by Oath*)

Citation *pro confesso*.

July 1616, Glendinning *contra* Tenants of Parton. — A decret of an inferior court was turned into a libel long after the defender's death, he being held as confessed, and yet no citation *pro confesso*. 21st December 1732, Robertson *contra* M'Kenzie. — A debtor was not holden as confessed, not being personally apprehended, the execution only bearing, *That the messenger came to his house, and knew he was within, and was forcibly kept out by his wife, and thereupon protested that the defender might be holden as personally apprehended*; for it was thought, That holding as confessed being a solemn and important certification peculiar to Scotland, this assertion of the messenger's in his execution should not be sufficient, not even to make a presumptive evidence against the defender, obliging him to prove *alibi*; but the Lords granted a new warrant to cite the defender at the mercat cross, under certification to be holden as confessed. Stair, 5th July 1670, Lindsay *contra* Inglis. — But where the execution bore, That the messenger was refused access, because the party was unwell, this execution was sustained to make the party be held as confessed. Stair, 5th February 1676, Hepburn *contra* Ld. Hilton. — Parties out of the country may be held *pro confesso*, upon a citation at the mercat cross of Edinburgh, &c. because there can be no personal citation in this case. Gofford 20th June 1673, M'Ewar *contra* Verner. Forbes, 3d July 1708,

Kinloch

Kinloch *contra* Forbes. Stair, Dirleton, 4th July 1676, Buchanan *contra* Logie. — But in this case, if the party be alive, he will be reponed upon his application. Stair, Dirleton, *ibid.* — A man having fled and absconded, after his creditors had cited him upon a summons executed at his dwelling-house; the Lords allowed them, before calling of the summons, a warrant to cite the fugitive edictally at the mercat cross of the head-burgh of the shire, where he dwelt and haunted, in order to hold him as confessed upon the libel, if he fail'd to appear when it should happen to be called. Forbes, 22d November 1712, Duke of Montrose and others supplicants *contra* Rob Roy.

Party held
as confessed up-
on an oath *non*
memini.

A PARTY having deponed *non memini* upon a recent fact of his own, whereof he could not be thought ignorant, he was thereupon holden as confessed. Stair, Dirleton, 6th February 1675; Irvine *contra* Carruthers. — A promise of payment being referred to the defender's oath, and he having deponed *non memini*; the Lords held him as confessed, unless he would be positive before extracting, it being *factum proprium*, within two years. Marcus, (*Oaths*) February 1682, *contra* Littlegill.

Effect of be-
ing held as
confessed.

IN a spuilzie the defender refusing to give his oath of calumny, and thereupon being holden as confessed; the Lords found, That this superfeded any probation by witnesses, either of the possession or spuilzie. Colvil, 6th February 1579, Cuninghame *contra* Ld. Kerse. — A libel being referred to a defender's oath, and he holden as confessed, and thereafter suspending; the Lords found, That his oath, not only could not be now taken, in respect of the sentence, but that he now deferring the verity to the pursuer's oath, the pursuer was not bound to swear. Durie, 16th June 1629, Ld. Coil *contra* Ld. Lochbouie. — A decret of spoilation of teinds, wherein the tenants were held as confessed upon the quantities libelled, which were apparently exorbitant, was restricted to the quantities contained in another decret, obtained by the same pursuer for other years, and proved by witnesses. Durie, 26th January 1628, Ld. Drum *contra* Tenants of Ld. Lesmore. — A decret in absence, holding the defender as confessed for exorbitant prices, far above the fiars, with an apprising following thereupon, was restricted to the fiars. Stair, 17th December 1680, Clark *contra* Sharp.

If parties
may be repon-
ed against be-
ing held as
confessed?

A SENTENCE for not compearance, holding the party *pro confesso*, being past, the Lords found, That he might be reponed to his oath, and the decret reduced, he having proved, That when he was ready to take journey to compear, he was hindred by infirmity of body and vexation of disease. Nicolson, (*Pro Confesso*) 26th June 1610, Ld. Merton *contra* Elliot. — One cited edictally as out of the kingdom, was reponed to his oath against a decret holding him confessed in absence, nothing having followed on the decret. Durie, 2d March 1630, Wright *contra* Wright. — The Lords, contrary to their constant practise, reponed one holden *pro confesso*, to his oath, after three or four years, because he was absent in Muscovy, where he could receive no account. Auchinleck, (*Probation by Oath*) 2d March 1630, Wright *contra* Wright. — A point being referred to a party's oath, and he holden as confessed, and, in a suspension of the decret, excusing his contumacy by simplicity and ignorance, and alledging, That he
came

came within a day or two after sentence, to have given his oath, but was not heard, because the decret was extracted. The Lords, altho' it was not verified that he came within so few days after sentence, and without respect to this reponed him to his oath, but ordained him to pay a large sum for the party's expences. Durie, 25th February 1637, Duncan *contra* Frazer.----A defender being holden as confest for not comparance upon alledged intromissions, soon after suspended, but died before the suspension was discussed; the Lords considering the decret was in absence, and suspended *de recenti*, and that the defunct had sworn upon deathbed, before ministers and others, that he never intromitted with the money; they turned the decret into a libel. Stair, 21st November 1672, Graham *contra* Smith.—A party being pursued on his promise, and a day taken to produce him to depone, and in regard he was valitudinarian, a commission being given to his own procurator to take his oath; but when they came, the servant refusing them access, in respect of his sickness, whereupon they taking instruments, and the inferior judge holding him as confest, and he dying within a few days; the Lords, in a pursuit against his heir on the passive titles, refused to repon him against the decret, holding his father so circumstantially as confest. Fountainhall, 11th February 1710, Mackie *contra* Paton.

THE Lord Rutherford being holden as confest, and reponed by way of suspension, on this reason, That he was out of the kingdom *animo remanendi*; a new term was assigned, and a commission granted to take his oath; but before the day in the commission came, he died, upon which the charger insisted to hold the defunct as confest, seeing he had not deponed *negative*. Answered, for the now Lord Rutherford, That the reponing his brother to oath, put him in the same condition he was, before the decret holding him as confest; and therefore the charger must prove his libel: The Lords, before answer, ordained the interlocutor to be seen, whether he was reponed *ex gratia* to purge his contumacy, in which case it appeared just, that the party not having deponed conform to the faculty given him, the presumptive confession should hold as probation against his heirs and executors; or if the decret was turned into a libel, upon some nullity or informality, in which case the contrary would obtain. Marcus, (*Oaths*) January 1686, Wright *contra* Lord Rutherford. — And it appearing, That the reason of reponing my Lord was an objection against the executions; the Lords found the presumptive confession did not militate against the defender. *Ibid.* — The defender in a forthcoming, having suspended a decret, holding him as confest, and the charger not having insisted, the suspender died some years after, without craving to be reponed, and the defender's heirs being pursued, they craved to be reponed against the said decret; which the Lords refused, seeing now the charger had lost the benefit of the defunct's oath, as to what he was debtor in, the time of the arrestment, and there was no nullity in the decret. Marcus, (*Oaths*) February 1688, Craick *contra* Wilson. — A libel being referred to the defender's oath, and the term circumduced, he appeared before decret and offered to depone, but the act not being there, it was referred to another time, the party having died in the *interim*, the Lords refused to give out the decret, seeing the defender had purged his former *mora* by making faith and offering

If a party die after he is reponed, but before he give his oath?

fering to depone, after which the term behoved of new to be circumduced against him. Fountainhall, 21st June 1701, Kincaid *contra* Blair.

Order of proponing Defences.

Declinator. THE Lords refused to allow a party to propone an exception *rei judicata* after litiscontestation. Spotiswood, (*Litiscontestation*) Colvil, May 1583, Lady Eglismouth *contra* Tenants. — One being pursued before an inferior court for a debt he had before suspended, and having proponed defences, upon which litiscontestation was made, and thereafter raised advocacy upon incompetency and iniquity, in so far as the defence of *lis pendens*, before the Lords, was unjustly repelled; the Lords found, That such a defence must be repelled, not being proponed before litiscontestation, seeing *primus actus judicii est judicis approbatorius*. Marcus, (*Advocations and Advocates*) June 1681, Wilson *contra* Hay.

Dilator. THE Lords refused to admit a dilator upon a depending submission to be proponed after a peremptor; and the defender's proponing it *peremptorie*, could not alter the nature of it by turning it to a peremptor. Hope, (*Dilator*) 20th January 1614, Gordon and Chalmers *contra* Gordon. — In a reduction and improbation at the instance of a posterior against a prior appriiser, in which, after taking terms, the defender pleaded no process, because the pursuer was not inest; the Lords found this dilator not competent in the present state of the process, after the taking of terms, and therefore repelled the defence. Marcus, (*Improbation and Reduction*) 13th July 1688, Mr. Burnside *contra* Crawford. — A party defender was allowed to improve the execution of the summons by way of exception, notwithstanding he had tacitly approved thereof, not only by his first compearance, but by seeking and procuring an incident for proving some peremptor exceptions, and had omitted to propone the exception of improbation *tempore litiscontestata*. Hope, (*Improbation*) 23d June 1612, Rae *contra* Lord Kellie. — In a reduction and improbation the defender having compeared in the first instance, and not having objected against the executions, but having taken terms to produce, and having gotten the full terms; it was found, That a decret of certification following thereon, could not be questioned in the second instance by improbation of the executions; for many times decreets proceed against parties not cited, but compearing for their interest, *qui suscipiunt judicium*; and if parties appearing object against the verity of the executions, the same will be sustained by defence, if proponed *peremptorie sub periculo cause*, if proponed *dilatorie ad excludendam sententiam*, the same will be repelled if the pursuer admit not thereof, but will be reserved by way of action of improbation, in which case the pursuer must be careful to preserve his executions; but if no objection be made by the defender, who thereby *suscipit judicium*, and decret *in foro* follow, it is not competent to him to object thereafter. Stair, 23d July 1674, Jamieson *contra* Hay.

Proponing a peremptory defence, how far it implies an acknowledgement of the libel? A FACTOR being pursued for his intromissions, and litiscontestation having been made upon a separate defence, in which the defender succumbed, he was not, thereafter, allowed to deny his intromission, which might occasion a new proof, and consequently two litiscontestations

tions in the same cause; but the Lords thought it were receiveable if the defender should instantly offer to verify by the pursuer's oath, that the rents sought were intromitted with by himself, or his other factors. Stair, 13th December 1664, Lord Rollo *contra* his Chamberlain. — A donatar of escheat pursuing intrometters with the defunct rebel's goods, the defence was, That the goods did not belong to the defunct, upon which a proof was allowed, and an act extracted; but the defenders having failed to prove their alledgeance, they recurred to another defence, which was, to refuse that they had intromitted; and it was pleaded, That a defender's succumbing in the proof of his defence, does not exoner the pursuer from proving his libel. It was answered, The defence made, That the goods belonged to a third party, was a virtual acknowledgement of the intromission, for the defenders could have no interest to propone this defence, unless upon the supposition of their intromission; the Lords repelled the defence. Fountainhall, 26th December 1695, Faa *contra* Nisbet. — A defender in a spuilzie succumbing in the relevancy or proof of a peremptor exception, is not allowed, thereafter, to deny the libel, but the spuilzie being held as committed, the avail and quantities may be instantly referred to the pursuer's oath. Balfour, (*Spuilzie*) 16th June 1547, *contra* Logan. — The like with regard to a process for payment of furnishing made to the defender. Gosford, 6th February 1672, Hall *contra* Spreul. — After proponing a peremptor defence, the defender is not at liberty to deny the passive titles. Dirleton, 13th December 1667, Rioch *contra* Stair, 6th November 1669, Scot *contra* — In a process upon the passive titles, the heir founding a defence upon partial payments made to his predecessor; it was found, That he was not at liberty thereafter to deny the passive titles, for he could have no interest to plead these partial payments, unless upon supposition he was to be liable for the balance. Fountainhall, 16th February 1697, Marquis of Tweddale *contra* Durie. — The like, where the partial payment was proponed in a declarator of extinction, July 1729, Johnston *contra* Logan. — A defence, which resolves into a *denegatio actionis*, or that the pursuer has no ground of action, will not conclude the defender as to the passive titles, because to a pursuer, who has no claim, he is not bound to say, whether he represents or not. Dirleton, 10th December 1674, Ld. Auchintoul *contra* Innes. — The Lords found prescription such a peremptory defence, as that the proponing of it infers acknowledgement of the passive titles. Fountainhall, 18th June 1696, Stewart *contra* Ld. Lamont. Dalrymple, Forbes, 11th February 1713, Lundy *contra* Lord Sinclair. Dalrymple, Bruce, 23d June 1715, Forret *contra* Representatives of Carstairs. — An apparent heir, who was pursued on the passive titles, having proponed this defence, That the bond pursued on was null by the act of parliament 1681, as wanting the writer's name; the Lords found, That he might propone it, without acknowledging the passive titles. Fountainhall, 21st November 1704, Ld. of Closeburn *contra* Ld. of Craigdarroch. — A party having been ordained, by the Lords interlocutor, to denude of a right as lawfully charged to enter heir to his mother; and he then representing by petition, That the interlocutor went upon a mistake, for there were no letters of general charge to enter heir, nor executions thereof produced; the Lords found no process on this informal libel, tho' it was alledged, That peremptories being proponed in the cause, and interlocutors

cutors in presence thereupon, the defender could not be allowed to recur to a dilatory, nor to deny the passive titles. Fountainhall, 10th, November, Forbes, 13th December 1709, Earl Lauderdale *contra* Lord Yester.--- In a process upon the passive titles, the apparent heir, not directly denying the passive titles, but entering into a submission about the validity of the claim; it was found, That this submission, wherein the defender was designed heir to his predecessor, tho' nothing followed thereupon, was sufficient to prove him heir, as to that cause allenary. Haddington, ult. November 1610, Weir *contra* Cleland.

Exceptio falsi est omnium ultima.

IN an action of spuilzie at the instance of a tenant, who had a tack, the defenders having *peremptorie* offered to improve the tack, and the pursuer having thereupon protested for condemnator, in case the defender succumbed in the improbation, and that he might not further be bound to prove his libel; the Lords admitted the same. Maitland, 28th April 1554, Stewart *contra* . --- An instrument or deed of reversion, being offered to be improved by the defender, and he succumbing in the probation, and thereafter proponing nullities thereof, viz. That it was not registred, &c. the Lords, nevertheless, sustained the reversion, because, by proponing improbation, he had past from all other defences. Colvil, 20th March 1573, Lord Oliphant *contra* Oliphant. --- After succumbing in an improbation of a bond, the defender was allowed to propone compensation against it, tho' he would not be allowed to propone payment, which would be inconsistent with his former alledgeance of falshood, which compensation is not. Stair, 19th June 1677, Binnie *contra* Gibson. Dirleton has this decision 20th June, and observes it a little differently.---A party having proponed falshood against an assignation, produced as the pursuer's title; and the act for abiding by being extracted, and the money consigned, the party, nevertheless, proponing yet divers other defences; the Lords found, That the proponing of falshood does indeed debar the proponer from quarrelling or objecting any nullity against the title, or writ craved to be improved; but that it can never cut off the defence of payment, or the like; and therefore the Lords here declared they would receive other defences, which did not concern the title, notwithstanding the brocard, *exceptio falsi est omnium ultima*. Fountainhall, 8th July 1697, Forrester *contra* Rowat.

WHERE falshood is proponed by way of action, in a libel containing both reasons of reduction and improbation, the pursuer may insist jointly on both. Stair, 22d February 1676, Ld. Innes *contra* Gordon.

Dilatory Defence, if it must instantly be verified?

DILATOR must be instantly verified. Stair, 10th February 1663, Crawford *contra* .---A defender offering to improve the executions of the summons, it was objected, That this was a dilatory defence, not instantly verified, and the defender proponing it as a *peremptor* defence, so as to be concluded, if he failed in the probation; the Lords sustained the defence proponed *peremptorie*, and allowed the defender terms to prove. Durie, 2d July 1630, Earl Home *contra* Stewart. --- A deed conveying lands in Ireland, being challenged in a reduction and improbation as forged, the defence was, *res judicata*, the defender having been

been affoilzied in a like process intended against him by the pursuer, before the Irish judges. Answered, This is a dilatory defence, which must be instantly instructed. Replied, The defender is willing to propone it as a peremptory, so as, if he succumbs, he shall have no terms to produce. The Lords, notwithstanding, refused to sustain the *res judicata in initio litis*, to bar production, unless instantly instructed, but reserved the same till after production. Stair, 6th February 1672, Murray *contra* Murray. --- In a reduction at the instance of an adjudger, of a voluntar right granted after citation, the defender refused to take a term, alledging the pursuer's adjudication was null, being upon a charge to enter heir; and it was offered to be proved, there was a nearer heir at the time than the person charged; the Lords found the alledgeance not receiveable *hoc loco*, being only proponed *dilatorie*, else all the consummate diligences in Scotland might be stav'd off by some such objection; but if the defender would propone it *peremptorie totius instantiæ*, they declared they would consider it. Fountainhall, 6th December 1693, Keiths *contra* Burnet.

Tho' *minor non tenetur placitare* be a dilatory defence, yet the Lords require it not to be instantly verified, but grant a term for proof. Stair, 24th February 1676, Kello *contra* Kinnier.

Incident Diligence.

THE Lords found, That if a man protest not for incident diligence at litiscontestation, he cannot get it received at the term of probation. ^{Ought to be protested for at litiscontestation.} Haddington, 8th March 1606, M'Brair *contra* Carruthers. --- The Lords refused a second diligence upon 60 days to summon witnesses forth of the kingdom, because at the time of litiscontestation, and assigning a day to prove his exception, the said defender did not protest for such diligence against witnesses being forth of the realm, neither would they admit him to give his oath that they were necessary witnesses, because he did it not at the beginning, and also refused to grant him a commission for examining the witnesses that were out of the country, altho' he offered to bring back the report thereof before expiring of the diligences against the witnesses within the kingdom. Spotiswood, (*Incident Diligence*) 23d November 1626, Watson *contra* Lord Holyroodhouse. --- An incident used by a defender, was sustained, being executed upon 60 days against some parties out of the country, altho', at litiscontestation, he protested not for an incident upon 60 days, nor then declared, That the parties were out of the country; only the Lords ordained him to make faith, that he had just cause to use that incident against those persons, and that they were necessary parties. Durie, 20th January 1627, Dunbar *contra* Tenants. --- Yet, in a like case, the Lords refused such an incident; but upon offer to make faith that the party at litiscontestation knew not that the persons were out of the country, a long day was assigned to the party user to lead all his probations of the exceptions, for which the incident was used, during which time he might execute his incident against all parties called therein. Durie, ult. February 1629, Muir *contra* his Tenants. --- But thereafter such an incident was utterly refused, altho' the party offered to make faith as above, because he protested not for it at the first term, nor did he summon them at that term, albeit he then summoned

moned others who were then out of the country, against whom he then protested for an incident upon 60 days. Durie, 26th January 1630, *Rofs contra*

Will not be granted to recover a man's own writs.

A MAN, for eviting the irritancy of a tack, having taken instruments upon his offer of the rent, was refused incident diligence for recovering these instruments from the notary, because, they being his own evidents, should have been extracted by him in due time, unless he would make faith that he had just cause to use the incident, and show probable causes of his want of the instrument. Haddington, 12th June 1611, *Seton contra Seton*. — In a process of abstracted multures, an exception being proponed by the defender, That both he and his author were infest in their lands *cum molendinis & molituris*, prior to the pursuer's infestment; the Lords, altho' they found the exception relevant, yet refused incident diligence against alledged havers of his said author's evidents, it being presumable that the same were in the defender's own hands, he having acquired his right from that same author, who probably delivered to him all the evidents of these lands. Durie, 6th February 1622, *Grier contra Maxwell*. — Incident will not be granted in an improbation to the defender for his own evidents, nor will an exception be admitted to him, alledging them to be in the hands of any, unless it be in the pursuer's hands. Haddington, 4th March 1612, *Ld. Lochinvar contra Drumlanrig*.

Writes in the parties own hands who craves the incident.

In an improbation, the defender craving an incident, and the pursuer craving his oath to declare what he had in his own hands; the Lords found, That the defender must first both depone and produce such writs as he confessed, before the incident could be granted for the rest, but a reasonable day was assigned to him to produce such as he confessed. Spotiswood, (*Incident Diligence*) 7th February 1628, *Earl Mar contra Vassals*. Auchinleck, (*Incident Diligence*) 14th February 1629, *inter eosdem*.

A second incident diligence, if it can be granted to cite new witnesses not contained in the first.

In a process of spuilzie, where destroying and eating up of growing corns was libelled; after probation by witnesses, and a second diligence run against others; the Lords, upon the pursuer's application, granted him a new diligence against others not mentioned in the first diligence, upon his making oath, that *noviter venerunt ad notitiam*; but this the Lords declared to be against common form, and only indulged in this case *in odium tam atrocis criminis*. Colvil, January 1589, *Karkettil contra Dickson*. — In a proof of death-bed, there being only two witnesses cited, one of them was cast and the other died, the Lords granted a new incident diligence against other witnesses, this being *casus inopinatus & improvisus*. Fountainhall, 17th December 1686, *Smiths contra Lady Ninewells*. — The Lords found, after Niddrie had led witnesses, and seen what they had deponed, he could not now crave others he condescended on to be examined, not being in his former diligence, tho' he offered to depone that they were *noviter venientes ad notitiam*, and that it should not stop the advising of the cause, for this might open a door for bribery and subornation of new witnesses, where he saw the former had not proved as he expected. Fountainhall, 23d December 1692, *Wauchop of Niddrie contra Kers*. — Parties who were to prove a point *pro ut de jure*, repre-

representing by petition, that their witnesses were either dead, or gone out of the country, after they were, by their Lordships extracted act and diligence, cited, or were cast upon legal objections, craving therefore warrant to cite others in their room, who were come to their knowledge since; the Lords found this to be against form, and a bad preparative, which might open a door to suborning and picking out of witnesses, and therefore refused the desire of the petition. Fountainhall, 16th July 1706, *supplicants*. --- A conjunct probation being allowed for trying a party's condition on death-bed, and one of the parties having cited a material witness, but afterwards shunning to adduce him, whereupon the other party complained that he was thereby deprived of the opportunity of putting cross interrogatories to him, and therefore craving, That either he who cited him might examine him, or give the plaintiff the use of his act to cite him; it was found, That a party could not be compelled to use any witnesses but whom he pleased, and therefore refused the desire of the bill as informal and irregular. Fountainhall, 7th February 1711, *Campbell contra Farquhar*.

A TERM being assigned to prove with continuation of days, a diligencetaken out any time before circumduction of the term, is sufficient. Stair, 5th July 1676, *Muir contra M'Aulay*.

Proof led before Commissioners.

IN a spuilzie first intended before the Lords, they having granted commission to certain inferior judges, before whom the libel was admitted to probation, it was found, That, without applying to the Lords, these commissioners might grant commission to others to examine witnesses. Colvil, May 1582, *contra*.

A PARTY who was sickly, and past 70, and living in Zetland, being to serve heir *cum beneficio* to one whose lands lay in Aberdeen shire, and petitioning the Lords for a commission to depone upon the inventory in Zetland, least the year should elapse; and the sea being infested with privateers, and the sheriff of Aberdeen refusing him a commission; in this new and unprecedented case, being the first of this kind that was demanded since the act of parliament 1695, the Lords yielded to a commission, and the next question being, Whether they, or the sheriff by their authority, should grant it; they at length thought fit to direct it streight to the Stewart-depute of Zetland themselves, to be reported to the sheriff of Aberdeen shire; but lastly, the occasion of a fleet going thither presently offering, which could not be expected for a long time again, therefore, least the year should expire in the mean time, the Lords made a further stretch on this speciality, and dispensed with its being read in the minute book, tho', regularly, nothing can be extracted till 24 hours after it has been read there, to give due advertisement to all parties concerned. Fountainhall, 17th June 1710, *Mowat of Hanmar supplicant*.

THE pursuer applying to have the defender held as confessed upon his failing to compare to depone upon the libel, which had been referred to his oath, and it being represented for him that he was under diligence, and could not safely appear, the Lords granted commission to any judge the pursuer pleased, to pass to some private place, where

the defender might safely depone. Durie, 8th June 1624, Strachan *contra* Scot.

Proof taken to ly *in retentis*.

Grounds
for this appli-
cation.

IN a process against a minor, *qui non tenetur placitare*, found, That the depositions of witnesses might be taken to ly *in retentis*, if need be, till the minor become major, the witnesses being old or valetudinary. Newbyth, 31st January 1665, Kelly *contra* Home. Gofford, 6th January 1671, Kellie *contra* Kinnier. — The like, in the case of the reduction of a disposition obtained by extortion, the witnesses being tenants or servants to the defender, and in hazard of being put out of the way. Stair, 13th January 1676, Ld. Castlemilk *contra* Whiteford. — A party who had raised reduction and improbation of a bond granted by his father on death-bed to his own sister, having petitioned that the witnesses oaths for proving the qualifications of the trust and reasons of reduction, might be taken to ly *in retentis*, tho' the witnesses were neither old, valetudinary, nor going out of the country; the Lords thought it more regular to examine *ex officio*, after the cause should be debated, and therefore called the defender's procurators, to see if they would instantly answer the reasons of reduction, and qualifications of trust, but thought, That if they declined, the Lords had latitude enough, in this circumstantiated case, to examine witnesses before answer; and accordingly, on their refusing to debate, the Lords ordained the witnesses to be examined. Fountainhall, 21st February 1696, Earl Southesk *contra* Viscount Stormont.

In improba-
tions.

IN an improbation of a *fasine*, the question being whether the witnesses could be examined before the party subscribed his abiding at the *fasine*; the Lords ordained the witnesses to be examined, reserving to themselves at advising to consider what their depositions should operate. Fountainhall, 12th June 1678, *contra* — The Lords were divided; whether the deposition of a witness in an improbation could be received to ly *in retentis* before the reasons came in to be debated in course, and it carried in the affirmative. Fountainhall, 30th July 1700, Earl Annandale *contra* Dalziel.

If allowed
before the day
of compar-
ance.

THE Lords refused to allow witnesses to be examined to ly *in retentis*, tho' they were going out of the country, and a process was raised by the party who craved the same, in respect no litiscontestation was made, nor so much as the days run that the defender could be obliged to answer to the petition, and the defender was then out of the country. Durie, 20th February 1629, Blyth *contra* Trotter. — The like, where the summonses were not executed, and so no dependence. Dirleton, 4th February 1675, Cranston *contra* Ker. — The Lords, upon a bill, ordained witnesses to be received before litiscontestation, and their depositions to ly *in retentis*, because they were in town for the present, & *senes valetudinarii*, & *peregre profecturi*, and upon such like considerations they declared that others might be received witnesses *in hoc statu*. Dirleton, 12th June 1667, Mitchel *contra* Mitchel. — In a reduction upon the head of death-bed, the Lords allowed the depositions

depositions of witnesses to be taken to ly *in retentis*, tho' it was before the day of compearance, and no allegation made, that the witnesses were old or valetudinary, or that there was a penury; for the Lords thought, tho' many witnesses were called, there might be few who truly knew the defunct's condition, and these might be removed out of the way, by death or by collusion. Stair, 16th February 1669, Creditors of Balmerino *contra* La. Coupar.—A party having raised a proving of the tenor of a discharge, and petitioning, That the examination of some of the witnesses might be taken to ly *in retentis*, because they were old and valetudinary, &c. the Lords refused it because of the state of the process, it being only executed for the first diet, and the summons yet blank, nor were the adminicles libelled or filled up. Fountainhall, 9th December 1685, Hamilton *contra* Master of Balmerino. — Upon great suspicion of practices used to impetrate from a person of quality a disposition of a whole barony to his Lady, in prejudice of his heirs; the Lords, upon application of the heir and creditors, allowed two of the instrumentary witnesses, yet alive, to be examined, to ly *in retentis*, whether it was read to him, whether he knew what he was signing, &c. and this, notwithstanding both the present heir and his father, the disponent's brother, had ratified the right; and altho' a reduction was now raised, yet it was neither seen nor returned. Fountainhall, 28th February 1696, Earl Lauderdale *contra* the Dutchess.

ONE of two witnesses to a private marriage, being at the point of death seven miles from Edinburgh, and the legitimacy of the party (who was a person of quality, and born long before the marriage of his father and mother) depending upon that witness's deposition, the party's service depending before the Macers, and the heirs of tailzie objecting against him as a bastard; the Lords, upon the party's petition to have the witness's oath taken to ly *in retentis*, granted the same, without either appointing it to be seen, or to abide the minute-book, the petition being presented on a Saturday, which made *periculum in mora*. Fountainhall, 24th June 1710, Earl Winton suppliant.

Summar application in cases of necessity.

Reprobator.

FOUND, That a reprobator of witnesses cannot be received, tho' ever so clear, before pronouncing the decret, but only if protestation has been admitted, which may afterwards be insisted on. Colvil, June 1580, Bishop of Murray *contra* Ld. Wester-Weemyss. — Reprobators are not competent but when protested for *re integra*, when other witnesses may be adduced. Stair, Fountainhall, 6th February 1679, Irvine *contra* Irvine. Stair, 30th July 1668, Ld. Milton *contra* Lady Milton. Dirleton, 22d June 1676, Irvine *contra* Irvine. Home, November 1683, Falconer, 25th February 1684, Newton *contra* Pope. — The pursuer of a cause before an inferior court, in which there was an act before answer pronounced, having advocated the same before the proof was concluded; and among other reasons of advocacy, having objected against one of the witnesses by way of reprobator, the Lords repelled the reprobator, in regard it was not particularly protested for at the examination of the witness; for, tho' the pursuer had protested in general for reprobators before leading the proof, that

Must be protested for.

step could signify nothing, as being a matter of course; and seeing he allowed the witness to be examined without a particular protest, the objection must be understood as past from, unless he could qualify that it was *noviter veniens ad notitiam*; and yet here *res erat integra*, and the defender might adduce more witnesses if this witness was cast. 5th January 1737, Wright *contra* Din. — In a question upon the edict *Nauta, Caupones*, two witnesses were led for the pursuer, and proved, that the clockbag was brought into the defender's house; at advising the probation the defender objected to one of the witnesses, that he was ultroneous, and had come to the messenger and desired himself to be cited. Answered, Reprobators were not protested for before deponing. Replied, Reprobators are still competent before sentence, and the defender was absent at deponing, being hindered by a great storm. The Lords found the reprobator receivable, tho' not protested for at the time. Fountainhall, 13th July 1700, Goodin *contra* Murray.

The witness must be cited, whose testimony is called in question.

THE Lords refused to admit witnesses to reprobate testimonies adduced in a process, unless the witnesses whose fame was chiefly concerned were cited. Stair, 9th November 1676, Paterson *contra* Johnstons. Stair, 18th January 1678, Irvine *contra* Irvine.

Reprobator competent, even where the witness has purged himself upon oath.

A PARTY having duly purged himself of partial counsel, the Lords refused to allow any other probation of partial counsel. Colvil, March 1583, Stewart *contra* Stewart. — It was pleaded, That reprobators are only competent where the pursuer cannot instantly verify his objections against the witnesses, and therefore protests for reprobator; but where the objections are referred to the witnesses own oaths, and they purged, there is no room for reprobator, because the oath is an oath of party *deferente adversario*. It was answered, This oath is not an oath of party *deferente adversario*, but a judicial oath, it being *pars judicis* to oblige witnesses to purge themselves upon oath. And as to these extrinseck points every witness is *testis singularis*, and so the oath of the witness may be a proof against himself, but cannot prove for him; and were it otherwise, reprobators would be sustained in no case against proofs led before the Lords, because of course they make witnesses purge themselves by oath, of partial counsel and of corruption, &c. The Lords found, That reprobators were competent, tho' the witnesses upon oath deponed upon their own hability. Stair, 31st January 1671, Ld. Milton *contra* Lady Milton. Dirleton, 10th November 1676, Paterson *contra* Johnstons. Fountainhall, 14th November 1678, Ld. Barclay *contra* Towie.

That a witness was corrupted, how relevant.

AN action of reprobator for setting aside the deposition of a witness was sustained, the libel bearing, That the witness before his deposition had got promise of good deeds from the party at whose instance he was adduced, which were performed to him after deponing, without necessity to qualify that the good deeds were promised and given by the party, and received by the witness, in order to depone falsely. Durie, 5th March 1624, Gechin *contra* Cochran.

In an action of reprobator, what proof may be taken?

IN an action of reprobator, the Lords both allowed witnesses to be adduced in the cause, and the defender's oath likewise to be taken upon interrogatories, because they thought the cause was of the nature of an

an improbation. Spotiswood, (*Reprobator*) 18th March 1624, Gichen *contra* Cochran. --- That a witness was corrupted, and bribed to depone falsely, found probable by the oath only of the party in whose favours the deposition was. Durie, 7th July 1632, Ld. Renton *contra* Ld. Wedderburn. --- Reprobators, tho' even pursued after sentence in the principal cause, may be proved *pro ut de jure*. Stair, Dirleton, 20th February 1672, Ld. Milton *contra* Lady Milton. --- A spuilzie having been pursued, first before the sheriff, and thereafter before the court of session, and some of the witnesses having been led in both processes; in a reduction of a decret of spuilzie obtained before the court of session, the depositions emitted before the sheriff were sustained to reprobate the witnesses, who, in their depositions before the court of session, were found to contradict the depositions formerly emitted by them; and this was found, tho' there could be no proper action of reprobator, not having been protested for. Stair, Fountainhall, 6th February 1679, Irvine *contra* Irvine. --- A witness being re-examined, because he was not purged of partial council in his first examination, acknowledged that he had received money to bear testimony, and was prompted by the pursuer how to depone. It was argued, That corruption and subornation was not probable after this manner, the latter testimony could never invalidate the former, otherwise there would be an open door for prevarication, and, by bribes, to engage witnesses to alter their testimonies; the opinion of all lawyers is, that a witness may correct himself before his testimony be subscribed, not after, and the only way is to protest for reprobators, and by other witnesses to prove the corruption; it was found, That subornation or corruption of witnesses could not be instructed by their own posterior testimonies. Stair, 25th February 1667, Lady Milton *contra* Ld. Milton. --- In a matter of fact, where there was penury of witnesses, it being objected against one of them, after he had deposed, That he was ultroneous in coming to the messenger and desiring himself to be cited, and so *prodiderat testimonium*; the Lords considering that this was *nuda emissio verborum*, the import whereof might be easily mistaken, therefore they found it only probable by the witnesses own oath, and granted diligence to re-examine him. Fountainhall, 13th July 1700, Goodin *contra* Murray. --- The like, where it was objected against a witness, That he had declared he would swear best to them who paid him best. Fountainhall, Forbes, 17th July 1707, Livingston *contra* Menzies.

UPON a supplication given in to the Lords, craving a command to the commissaries of Edinburgh to pronounce sentence in the action of divorcement betwixt the supplicant and his wife; the Lords found, That the inviolable custom was to stay advising of the process and sentence, where there was a reprobator depending against any of the witnesses. Durie, 26th June 1623, Cochran *contra* Gechin. --- That action only is properly called a reprobator, which is, intended to redargue the *initialia* of a witness's deposition, in order to convict him of perjury, and thereby to annul his deposition; and therefore an action of corruption against a witness, libelling upon a fact of which the witness had not purged himself, was found not to stay the advising and ending of the principal cause. Durie, *ibid.*

Depending
reprobator
stays sentence.

Reprobator
after sentence.

IF a reprobator be protested for, an action of reprobator is competent after sentence to annul the same, as well as before sentence. Durie, 26th June 1623, Cochran *contra* Gechin. Durie, 3d December 1635, Robison *contra* White. But in this case the Lords appointed the pursuer of the reduction to consign L. 100 to be given to the defender, in case the action should be found groundless.

Judicial Steps, how far under the power of parties to be retracted, altered or amended?

After litis-
contestation
the pursuer
not allowed
to pass from
his process.

FOUND, That after litiscontestation, *i. e.* when the defender propones a peremptor exception, which is referred to his probation by interlocutor, the pursuer cannot renounce the instance, altho' the defender have taken no term to prove his exception; and that absolvitor must be given upon his so doing, or else that the pursuer must pass from the whole cause. Colvil, 15th February 1575, Ld. Bargeny *contra* — Found, That a pursuer may pass from his libel before a term be assign'd for probation, altho' defences, replies, duplies, &c. be proponed, and that he may pass from the instance, and raise another libel, re-founding alwise the defender's expences at sight of the Lords. Colvil, Spotiswood, (*Litiscontestation*) March 1583, Knowes *contra* Irvine. — Found, That where the pursuer passes from his compearance *pro loco & tempore*, the defender should not only have his interlocutor, but also his sentence absolvitor upon all exceptions that are found relevant and proved. Hope, (*Defender*) 10th June 1625, Dr. Jolly *contra* — Found, That after protestation granted in the principal cause, and after citation by ordinary action of two summons to insist, and after a term given and taken by the party then compearing, to insist, he could not thereafter pass from his compearance and be absent; but found, That certification ought to be granted against him as compearing. Durie, 20th July 1636, Earl Queensberry *contra* Lord Torthorwald. — A cause being ready to be advised by the Lords, who had remitted it to some of their number to settle the parties, and they accordingly having given their opinion, with which the pursuer was dissatisfied, and thereupon the defender craving, by bill, that the cause might be advised, and the pursuer offering to pass from the instance, *simpliciter*, tho' it was alledged that he could not now, *in hoc statu*, it being a common process; the Lords allowed him to pass from his process. Fountainhall, 23d December 1685, Lord Pitmedden *contra* Reid. — The Lords refused to force the pursuer of a reduction, who had taken up his process, to reproduce it and insist, altho' the first term was run. Fountainhall, 11th December 1686, Dundas *contra* Wallace. — Defences having been proponed, and litiscontestation made in a process of astricted multures; the Lords, in a subsequent process, allowed the pursuer to pass from the said first process and act of litiscontestation, and ordained the defenders to propone all their defences in this pursuit, which they proponed in the first. Auchinleck, (*Litiscontestation*) 18th July 1627, M'Clelland *contra* Vassals of Monkland. — After litiscontestation, the pursuer having assigned the debt; in a new process at the assigney's instance, the Lords found, That the assigney might pass from the first pursuit, unless the defender could instruct, That he was prejudged thereby. Auchinleck, (*Litiscontestation*) 16th March 1628, Home *contra* Home. — An executor-

executor-creditor insisting against a debtor of the defunct's; who was before pursued by the defunct himself in another court; in which process, there was litiscontestation; this was found a good defence to the debtor, so that he could not be pursued elsewhere, and the executor-creditor was obliged to desert this, and take up the former process. Stair, 10th February 1663, Crawford *contra*

FOUND, That a party may pass from his defence in a cause, and suffer decret to go out against him for null defence, altho' *ante litem contestatam* he had proponed dilators, which were repelled. Colvil, ^{If a defender may withdraw his countenance?}

January 1584, Lord Gray *contra* Constable of Dundee. — A tack of teinds being produced in a process by the defender, and the pursuer throwing in a reduction thereof *incidenter*, and the defender offering to take up his tack again; the Lords found, That a party might take up any writ (not quarrelled as false) before alledgeances were proponed thereon, or litiscontestation made in the cause. Fountainhall, 24th January 1696, Earl Caffils *contra* Montgomry.

THE Lords found, That litiscontestation is not induced by proponing a dilatory exception, altho' an interlocutor follow thereupon, but only upon proponing a peremptory one, and where the summons, or any part thereof, or a peremptory exception or alledgeance is admitted to the pursuers or defenders probation. Balfour, (*Litiscontestation*) 11th February 1541, Tenants of *contra* Town of Selkirk. 20th May 1542, *contra* Heirs of Innergie. — Litiscontestation was found not to be made, altho' peremptory exceptions were proponed in writing, and answers thereto, unless the said exceptions had been actually admitted, or the libel denied, or the pursuer had got the libel to his probation. Maitland, 23d February 1554, the Queen *contra* Ld. Caprington. — The Lords found, That no litiscontestation is understood to be made, unless a term be assigned, altho' a peremptory exception was repelled, and a reply admitted. Colvil, February 1583, Lady Lundie *contra* Gray. — Litiscontestation was found not to be properly made in an improbation till after production. Hope, (*Improbation*) 18th December 1621, Lo. Dunipace *contra* Pantaskin.

THE Lords found, That a libel may be mended, altered, or words therein deleted, any time before an act of litiscontestation be past, notwithstanding that defences and answers have been proponed. Sinclair, 9th February 1541, Rutherford *contra* Earl Bothwell. Sinclair, 11th February 1541, Tenants of *contra* Town of Selkirk. Sinclair, 17th February 1541, Earl Bothwell *contra* Bethune. — Found, That after litiscontestation, the pursuer cannot alter or pass from any part of his libel. Sinclair, 11th December 1546, the Queen *contra* the minister of Scotlandwell. — A pursuer having made litiscontestation upon the defender's intromission, he was not *in termino probatori* allowed to condescend upon any other particular intromission than was contained in the act, altho' he offered to refer it to the defender's oath of verity. Haddington, 28th November 1609, Henderson *contra* Graham. — Found, That a general libel may be made special, *cum processu*, by a judicial declaration. Sinclair, 17th May 1542, Commandator of the priory of St. Andrews *contra* Tenants. — A defender having proponed peremptory defences, which would have subjected him

him to the passive titles, if libelled, but no passive title being libelled, save that of *lawfully charged to enter heir*, and yet no charge produced, which the proponing peremptors could not infer an acknowledgement of, since it never was; the Lords refused to allow the pursuer to amend his libel by inserting the other passive titles, in order to conclude the defender as to these. Forbes, 13th December 1709, Earl Lauderdale *contra* Lord Yester. — No new conclusion can be eiked to a summons, after an extracted act, far less after an extracted decreet-abfolvitor. Forbes, 3d July 1712, Colquhoun *contra* Ld. Newmains. — In a process of reduction and improbation, the Lords allowed the pursuer to eik to his libel the very points whereon he insisted, not only after the outgiving, but even after two acts of production were extracted in the process. Bruce's MS. 28th July 1716, Ld. of Meldrum *contra* Feuars of Oldmeldrum. — Ejection being pursued after three years, the pursuer was allowed in the same process to restrict his libel to bare intrusion, without a new summons. Spotiswood, (*Ejection*) 2d March 1627, Mowat *contra* Davidson. Spotiswood, (*Ejection*) Durie, 16th March 1627, Hay *contra* Ker. — In a process upon the passive titles referred to the defender's oath, he acknowledged his intromission with the rents of his father's estate, but that it was *singulari titulo* in virtue of adjudications he had purchased in; and the pursuer upon this discovery, finding himself entitled to redeem these adjudications for the price paid by the apparent heir, and thereupon insisting, That he should condescend upon the price, the question occurred, If the defender was obliged to make this acknowledgement in the present process upon the passive titles, or if the pursuer was to raise a new process, *viz.* a declarator of redemption; the Lords found it unnecessary to multiply processes, and ordained the defender to be re-examined upon the price he paid for the adjudications. Fountainhall, 23d December 1693, Douglass *contra* Cockburn.

After litif-
contestation,
if alledgeances
may be past
from, or new
alledgeances
admitted?

A PARTY having first offered to improve a writ, and then alledging, That he had also a nullity to propone against it, which he craved might be reserved to him *per expressum*, in case he should fail in the improbation; the Lords refused to reserve it to him, but allowed him to pass from his improbation if he pleased, and take him to his nullity, because there was no term yet assigned to him to improbat, before which it was thought there was no litifcontestation made in the improbation. Spotiswood, (*Improbation*) 5th February 1635, Ker *contra* Forsyth. — Improbation being proponed by way of defence against a bond, and a term assigned to prove: Before the act was extracted, tho' the term was come, the defender was allowed to propone payment; tho' it was objected, That *exceptio falsi est omnium ultima*, after which no other could be proponed. Stair, 23d January 1666, *contra* Earl Kinghorn. — A suspender who offered to improbat bonds he was charged upon, as false, was allowed, after his consigning, L. 40 and giving in articles of improbation, and the charger's abiding by the verity of the writs quarrelled *sub priculo falsi*, but before any act extracted, to pass from his improbation, and found upon payment instantly verified by discharges produced, he always deponing, That these discharges came to his hands after proponing falshood; but the Lords ordained the L. 40, consigned by the suspender, to be given up to the charger. Forbes, 16th July 1713, Dunbar *contra* Earl of Cromartie. — The pursuer of

of an action, offering, by way of reply, to impropat an instrument, and a day being assigned to him for that effect, and he suffering the day to elapse, without raising any diligence, and the defender having extracted the act, and desiring the term to be circumduced; upon the pursuer's offer to pass from his impropation, and declaring that he would insist in a reduction (raised by him after the term assigned for impropating) the Lords refused to allow the pursuer to pass from his impropation after the term, and found, That he ought to have done it before judicially, and this because of the great vexation of the party. Spotiswood, (*Improbation*) 9th January 1630, Watson *contra* Smeton Hepburn. — A party having offered impropation of a discharge, after consignation of the L. 40, and an extracted act; the Lords refused to allow the party to recur to an exception of nullity of the discharge as wanting witnesses. Stair, 3d July 1662, Peacock *contra* Baillie. — The contrary found, and the nullity admitted being instantly verified. Forbes, 13th February 1706, Dawson *contra* Murray. — After proponing of peremptors, the defender is not at liberty to deny the passive titles, but, before extracting the act, he may pass from his peremptors and take himself to the denial of the passive titles. Stair, 15th December 1671, Hamilton *contra* Ayton.

In a spuilzie the Lords refused to suffer the defender to compare and propone any defence after litiscontestation made, admitting the libel to probation, altho' in absence of the defender, and altho' the pursuer had adduced no probation; and this because of the state of the process, which stood not at the first term of probation, but at the second of further diligence, after which the order and course of process could not be interrupted, as after the first term it might. Durie, 15th June 1622, Gordon *contra* M'Clellan. — In a process for payment of a tack-duty, a proof, which was led in the cause, coming to be advised, the defender recurred to a defence, not formerly opened, *viz.* That the claim was fallen by the quinquennial prescription the Lords found it not now receiveable, for that were to force the pursuer into a new act of litiscontestation, in order to prove interruption, notwithstanding the defender offered to pay the expences. Fountainhall, 25th November 1693, Swinton *contra* Primrose. — In advising a concluded cause, the Lords allowed a new alledgeance, not proponed in the act, to be proved by the party's oath, but found it must be *cum onere impensarum*, if he depone *negative*. Fountainhall, 2d December 1693, M'Corkal *contra* Sanderson. — But even after an extracted act of litiscontestation, upon a defence of payment, which the defender failed to prove, he was allowed to object against the foundation of the debt; because, tho' a defender's neglect may have the effect to cut him out of his defences against a claim constituted in law, it can give no authority to the judge to determine in favours of a pursuer, who has no ground of action. Durie, 10th January 1627, Ld. Thorntoun and Strachan *contra* Keith. — It must be kept in view, that with regard to the pursuer, he is not barred by litiscontestation from making new alledgeances, and insisting upon new *media concludendi*: For if a decret does not exclude him, far less an act of litiscontestation. See this below, in the section *Competent and omitted*.

AN exception of *noviter veniens ad notitiam*, was received by the Lords, after conclusion of the cause, the proponer making faith, and the

What if *noviter veniens ad notitiam*?

the same being referred to the pursuer's oath of verity, being present. Haddington, 25th November 1609, Auchmoutie *contra* Ld. Mayne. — After litiscontestation, the Lords refused to receive either exception or reply, as *noviter veniens ad notitiam*, where the same consisted *in jure*, seeing no party ought to be ignorant of the laws. Durie, 9th June 1624, Ld. Touch *contra* Earl of Home. — An exception being admitted to probation, and a term assigned, the pursuer seeking protestation at calling the act, and the defender desiring to be heard to propone another peremptor, whereupon he was ready to make faith, That it was *noviter veniens ad notitiam* since the term of the act; the Lords found, that since this was the first term of the said act, the exception might be proponed and received; but first they took trial of the defender's probable ignorance, it being *super facto alieno*, and then took his oath, That he knew not of the exception but since the term of the act. But here the Lords refused to grant incidents to prove the said exception, but assigned a long term to prove, at which term they declared they would conclude the cause without further diets, and in the mean time that the defender might use what diligence by incident or otherwise that he pleased. Durie, 8th June 1627, Crawford *contra* Cuninghame. — The Lords found, That after sentence given *in foro contentioso*, the party then compearing ought not to be heard to reduce that sentence, upon the reason of instruments and writs newly come to his knowledge. Durie, 20th January 1631, Gordon *contra* Earl Galloway.

After litis-
contestation, if
a party will
be admitted to
pass from his
mean of proof,
and chuse a
different one?

A PARTY who has chosen his mean of proof by writ or witnesses, and allowed the term for proving to elapse, is not admitted thereafter to refer the libel to the defender's oath. Durie, 29th January 1639, Lady Westmuirland *contra* Lady Home. — The like. Spotiswood, (Incident) 21st January 1630, Duke Lenox *contra* Cleland. — In probations *pro ut de jure*, the party having undertaken to prove by witnesses; after the term is past and circumduction craved, if the other party be present when the act is called, he may yet have the benefit of his oath, or he may cite him *apud acta*, being an instant verification, but there can be no new term assigned to take the oath. Haddington, 25th November 1609, Auchmutie *contra* Ld. Mayne. Haddington, 16th January 1610, Ld. Smeiton *contra* Dick. Stair, Fountainhall, 22d June 1678, Walwood *contra* Walwood. — Litiscontestation being made in a cause & *in termino probatorio*, the witnesses being at the bar, and the defender then chusing rather to leave the libel to the pursuer's oath; the Lords ordained the pursuer to give his oath instead of the other probation; and because he was absent, ordained the defender either to bear his expences in coming to depone, or to yield to a commission to take his oath in his own bounds. Auchinleck, (Litiscontestation) 21st July 1627, M'Donald *contra* M'Kenzie.

What if he
has used his
mean of proof?

THE Lords refused to allow a pursuer to refer his reply to the defender's oath after concluding of the incident. Hope, (Oath) 5th July 1617, Finlayson *contra* Gray. — After the pursuer had gotten the libel admitted to his probation, and witnesses received and examined thereupon; the Lords found, That the defender was not bound to give his oath of verity in the cause. Colvil, 1st July 1574, Earl Sutherland *contra* Earl Caithness. Colvil, 20th January 1675, Ld. Glenbervy

Glenbervy *contra* Ld. Udney. — A party's oath was sustained, tho' after an election of a proof by witnesses who had proved nothing. Fountainhall, 15th November 1677, Thomson *contra* Ross. — The Lords turned a decret into a libel, in respect of this informality, That the pursuer having referred the libel to the defender's oath, he had also led witnesses thereon, tho' it was alledged that the witnesses were first adduced, and in so far as they did not prove, the libel was referred to the defender's oath; but this the Lords found irregular, these two probations being contrary and incompatible *super eodem subjecto*, and it behoved the pursuers to rest content with one of them. Fountainhall, 26th February 1686, Horn *contra* Strachan. — The quantities and prices in a decret being proved by witnesses, it was not found relevant in a suspension to prove by the charger's oath that the quantities and prices mention'd in the proof were exorbitant, because this tended to infer perjury of the witnesses. Stair, 22d June 1676, Irvine *contra* Ross. — An exception of improbation of a horning being admitted, and the cause holden as concluded thereupon; the Lords refused to receive certain articles of approbation of the said horning offered by the pursuer, as also refused to take the improver's oath upon the verity of the horning, because the cause was litiscontestated and concluded, by taking the depositions of the witnesses. Durie, 15th June 1622, Ld. Roslin *contra* Ld. Halton. — The manner of probation being fixed by the act of litiscontestation to be *scripto*, yet at the pursuer's desire the defender was ordained to give his oath only in supplement of the probation by writ produced, which made not two litiscontestations. Spotswood, (*Litiscontestation*) 22d July 1631, Acheson *contra* Murray.

A PARTY may adduce writ to prove an article of a rental, if the witnesses he hath led have proved nothing of it; but otherwise he may not, if they have proved in part. Fountainhall, 23d January 1680, Paton *contra* Stirling.

IF the defender swear not positively, but only *non memini*, the pursuer is at liberty to adduce further proof. Gosford, 19th, Stair, 20th July 1672, Fisher *contra* Lithgow. — A point that might be proved by witnesses being referred to the party's oath, tho' thereafter witnesses could not regularly be received to prove the point, the pursuer having once chose his method of probation; yet the party's oath not being positive or direct, but *ex auditu tantum*, witnesses were in this case admitted. Stair, 27th January 1677, Thomson *contra* Currie. — A promise being referred to the defender's oath, he deponed, "That he had resolved to give such a sum, but had not engaged for the same, and that if all his missive letters upon that subject were laid together, he believed they would import no more;" the Lords refused to allow the pursuer to prove the promise by the defender's missives, albeit he was not positive that they bore no such promise, because the pursuer having chosen his probation by the defender's oath, which was positive that no promise was made, they would admit of no other probation. Stair, 27th February 1673, Kincaid *contra* Dickson.

Act before Answer.

IN a process of molestation, commission being granted to examine witnesses *hinc inde* upon the possession of either party; the same being

reported, the defender craved *Avisandum*. The pursuer alledged, That he was not insisting, and that there being no litiscontestation, the defender could not compel him to insist, without a process to insist with certification, in which case he would get a day to insist. The Lords found, That the probation being taken before answer, was equivalent to litiscontestation, and that they might proceed both to advise the points of probation and relevancy together, and might instantly decern accordingly, albeit it hindered not the parties to propone other alledgements *in jure* than were in the dispute, as in ordinary litiscontestation. Stair, 4th December 1661, Baillie *contra* Town of Inverness.

AFTER an act before answer for proving death-bed, parties can propone no new defence, nor crave terms to prove the same. Stair, 6th December 1672, Cleland *contra* Cleland.

THE Lords declared, That where witnesses are adduced before answer they will only allow one term, so as to admit no witnesses but those who are cited by the first diligence. Dirleton, 21st June 1672, Ld. Hermiston *contra* Cockburn. --- After an act before answer no new proof is admitted by posterior acts of litiscontestation. Stair, 4th June 1674, Cockburn *contra* Halyburton. See the act of Sederunt, 23d July 1674.

Wakening.

AFTER decret is pronounced, tho' it ly long over before extract, wakening is not necessary. Stair, 1st July 1671, Brodie *contra* Lord Kenmuir. --- The Lords having decerned a purchaser of lands in the balance of the price when a sufficient progress should be given; and this lying over year and day, their Lordships found, That this, tho' a decret, being upon the matter but an interlocutor, the pursuer (now that he had produced a progress) must waken it in common form. Fountainhall, 7th January 1709, White *contra* Oswald.

THE Lords found no necessity of a wakening, where the action had been several times called within the year, tho' nothing was marked thereupon. Home, November 1682, Home *contra* Earl Home.

A CAUSE was found not to be sleeping, tho' nothing was done therein from the 14th February 1706 to the 30th June 1707, in respect the session was under adjournment from the 1st November 1706 to 4th February 1707, and in order to the sleeping of a cause the time of adjournment was to be considered as *tempus inutile*, and to be made up of so long of session, without reckoning the vacation. Forbes, 22d July 1707, Maitland *contra* Brand.

Two defenders being called in one summons, concluding a declarator of right to an apprising against the one, and that the other should be liable for payment of the sums therein contained; the Lords found the process sleeping as to the later, notwithstanding the pursuers continued insisting against the former to remove all objections against his active title, which seem'd a prejudicial question to be determined before he could effectually insist upon the conclusion of payment. Forbes, 2d February 1710, Earl Lauderdale *contra* Lord Yester.

Compt

Compt and Reckoning.

IN a process at the pupil's instance for compt and reckoning, the tutor being found to be superexpended, the pupil may be decerned for the balance upon his own process, without a new process at the tutor's instance. Stair, 11th January 1668, Grant *contra* Grant. — A reason of reduction of a decret *in foro*, being, That divers articles were brought into the accompt and decerned for, which were not libelled on; the Lords repelled the nullity, without prejudice to the party (a minor) to insist on any material grounds of lesion. Fountainhall, 5th February 1712, Lord and Lady Ormiston *contra* Hamilton.

IF there is a total defence exclusive of the whole accompt, it ought to be proponed and discuss'd at the bar, to exclude the accompts going to auditors, unless it be emergent after act of *compt and reckoning*; and therefore, after the defender has seen the pursuer's accompt, he ought *simul & semel* to propone his defences, first against the relevancy of the articles in the charge, and then offer his articles of discharge; whereupon the pursuer is to be heard, and litiscontestation to be made on the whole. Stair, 22d June 1678, Home *contra* Home.

When understood to be *res judicata*.

A CRIMINAL libel for theft having been brought before the court of justiciary, wherein there was also a conclusion of damages, and the judges having found the same relevant to infer the pains of law, and after the facts were found proved by the jury, having pronounced a sentence *condemnitor*, but without pronouncing any sentence upon the damages; the Lords of session found this not to be a *res judicata* to bar a civil action for damages upon the same fact. January 1731, Buntein *contra* Buchanan.

Form of extracted Decreets.

A DECREET was found null, because subscribed and extracted by the judge in absence of the clerk, these two offices being found not suppliable the one by the other. Durie, 10th January 1623, M'Dowal *contra* Prior of Ardchattan.

A DECREET was found null, in respect that in the *because* of the sentence it bore not, That the libel was found relevant and admitted to probation, and a term assigned to prove, altho' these steps had been *de facto* taken. Durie, 10th January 1623, Ld. Dirleton *contra* Ld. East-Nisbet. — In a reduction of a certification in an improbation, the Lords repelled this reason of reduction, *viz.* That it made no mention of a second term assigned, because that *in rei gesta veritate* there were two acts assigning two terms produced, & *plus valet quod agitur*, &c. and if a clerk by mistake give out a decret wrong, he may, conform to the true warrants, rectify it in a second extract. Fountainhall, 11th December 1695, Brown and Lauder her husband *contra* Burnside. — A decret *in foro* holding the defender as confess'd upon the verity of a debt referred to his oath, was refused to be

annulled, upon this reason, That the decret proceeded upon a licence to pursue, and did not mention that the debt was confirmed before sentence, in respect it was really so confirmed, nor yet would they annul it for being obtained at the instance of tutors nominated acting for their pupil, without producing the nomination, in respect the pursuit was founded on a decret-dative, decerning them executors for their pupil, and a licence for them to pursue procured before the Commissaries upon production of the nomination. Forbes, 20th January 1713, Johnston *contra* Houston.

IN a reduction of a certification in an improbation, this nullity was refused to be sustained, *viz.* That there were several petitions and deliverances on debate some of them two years after the certification; which the Lords had no respect to, because the said deliverances were only adherings to their former decret, with some qualifications or rectifications; it being the practice of the clerks (tho' it might deserve some regulation) to extract the decret of the date whereupon it was first pronounced. But their Lordships found, That if there had been any new production made after the first date, and debates, reports, or *avisandums* made with the same, then the wrong date would import a nullity. Fountainhall, 11th December 1695, Brown and Lauder her husband *contra* Burnside. --- The first adjudication upon which charter and sasine had followed, and of which the rest were not within year and day, was quarrelled upon this ground, That the extracted decret of adjudication was disconform to the warrants. The extract bore, that the decret was simply in absence, whereas upon looking into the warrants it appeared that the decret was *in foro*, a production made by a third party of a right to the lands in order to bar the adjudication; another production made by the pursuer, in order to take off the effect of the former production, interlocutors upon these productions, &c. It was answered, That tho' there might be some error in the form, there was none in the substance; the extract narrated the precise lands that were adjudged, and so no hurt to any mortal. Replied, The extractor's province is to give a faithful and exact account of the steps of procedure, and not to dress up processes in fancied shapes of his own; and if such liberties were allowed extracts could bear no faith, which behoved to render them useless to the lieges. The Lords would have found the decret simply null; but the creditors having insisted in their objection *ad hunc effectum* only, to bring them all in *pari passu*, the Lords found the decret informally extracted, and sustained the objection to restrict the adjudger to a preference *pari passu* with the other adjudgers. 27th January 1736, Adjudgers of Falahill *contra* Cunningham of Comrie.

THE probation in a baron's decret against his tenant, being only the party's judicial confession of the debt, it not having been referred to oath; the Lords sustained the decret, because instantly the obtainer of the sentence produced writ verifying the summons, which they found sufficient to maintain the sentence, altho' the same was not mentioned in the decret. Durie, 8th July 1624, Richardson *contra* Hay. — A decret was found null as without proof, because the writ whereby it was to have been proved, tho' libelled upon and *de facto* produced, was not narrated in the production. Stair, 22d February 1671, Pitcairn *contra* .

THREE several decreets of apprising, containing each of them a distinct sheriff-fee, being extracted by the clerk in the apprising against three debtors bound all in one bond, were found null, in respect there was only one claim given in to the messenger, one letters of apprising, and one decreet pronounced by the messenger. Fountainhall, 15th January 1706, *Loch contra Home*.

Decree in Absence.

By the regulations 1672, § 19. a decreet is not understood to be *in foro*, unless compearance be made for the party, and defences proponed; and therefore a decreet of suspension was not found to be *in foro*, tho' there was an appearance for the suspender and the suspension produced, but no debate, the charger then not being ready to insist; and tho' the suspender also gave in a bill to the Lords, craving something to be done in the *interim*, but not dipping in the cause. Fountainhall, 17th December 1701, Chyrurgeons in Glasgow *contra Reid*. The Lords divided on this question, if it was to be repute a decreet *in foro*, where a party compeared and produced an interest for a ground of competition on the subject in controversy, but afterwards was absent, and proponed nothing upon his interest, so that the other party was preferred. Some urged, that one after compearing in this manner, and finding his right posterior, might withdraw, and then vex men with new processes; but the plurality, tho' they found it a decreet *in foro*, yet it could not be accounted a decreet *in foro contradictorio*, no defence being proponed as the act of regulations 1672 requires. Fountainhall, 29th December 1692, Philip *contra Ogilvie*. — An advocate's compearing for a party, and making no defence, but declaring that he had nothing to object against the debt therein claimed, does not make a decreet *in foro*. Forbes, 14th December 1711, Representatives of Smith *contra Semple*.

What understood to be a decreet in absence.

It being doubtful whether the peerage of the family of Lovat descended to heirs-male or heirs-female, the heir-female, while the heir-male was abroad, obtained declarator of her right to the peerage. This decreet being simply in absence, and passing without proof, when the heir-male appeared for his interest, the question occurred, if it should be turned into a libel, or be allowed to stand, with liberty always to the heir-male to be heard upon his pretensions to the peerage *tanquam in libello*; it was yielded for the heir-female, that in processes for payment, where the decreet is in absence and without proof, there is both reason and custom for turning such into a libel; it remains still incumbent upon the claimant to bring evidence of his debt, and as he is *in prosequendo*, his decreet can be of no use to him where it is objected to; but that decreets of declarator of a *jus incorporeum* stand upon a different footing, they give instant possession, and have their full effect without necessity of further diligence; and as the heir-female in virtue of her decreet stands in possession, there is no reason she should be deprived of her right of possession, till the heir-male's right be made out in a counter action of declarator. Answered, Possession commonly makes a presumptive title to the property, which must found a right to continue possession until the presumption be taken off by a contrary proof.

Decreet in absence, what effect it has?

proof; that in the present case the possession, founded upon a decret in absence without proof, can be no presumptive title, and therefore the heir-female ought to have no benefit by such a possession. The Lords turned the decret into a libel.

February 1728, Simon Frazer *contra* Hugh Frazer. — A decret-absolvitor pronounced in absence of the defender, found a *res judicata* in another process consequent upon the former, raised at the defender's instance against the pursuer's representatives; tho' it was pleaded as extremely unequal, that party's absence should give them all the benefit of the sentence when in their favours, without being tied down when it is against them; in respect it was answered, That a decret in absence must have this effect or none at all; and with respect to the inequality, the pursuer against whom the decerniture goes ought not to be in a better situation than if the defender had been present. 29th January 1735, Craik *contra* Craik.

Reduction of Decreets.

Regulations
1695.

THE article of the new regulations touching decreets their being opened no further than the nullity objected, and to stand *pro reliquo*, was found only to relate to decreets *in foro*, but not to those in absence. Fountainhall, 30th July 1696, Duke of Gordon *contra* Gordon.

Decreet in-
formal, but
materially
just.

IN a process for reducing a decret upon manifest nullities, several years after its date; the Lords thought it incongruous to loose a decret *in foro* upon nullities, where the alledgeances against it *in causa* (altho' it were opened) would not be relevant; and finding what was now proponed, to be irrelevant, and that the decret, tho' informal, was materially just; therefore they sustained the decret, and affoizied from the reduction. Fountainhall, 28th July 1709, Murrays *contra* Shorts.

Decreet
founded upon
an error in
fact.

A DECREET-ABSOLVITOR having been obtained from a reduction upon the act of parl. 1621, of provisions granted to children, upon this *medium*, That there was no bankruptcy proved when the father granted these provisions; in a reduction of this decret absolvitor, the creditors set forth, that the same was obtained upon a mistake in fact, an estate being brought *in computo*, as belonging to the father, which he was denuded of in favours of his eldest son before granting the provisions in question: And it was pleaded for them, That tho' parties may be barred from quarrelling a decret upon new grounds in law that were competent and omitted, no sentence can be of any force, built upon a supposition, which comes out to be false in fact. The Lords turned the decret into a libel. Marcus, (*Decreets*) 20th December 1682, Creditors of Moufwall *contra* his Children.

Competent and omitted.

Bars not
pursuers,

COMPETENT and omitted is only good against defenders or suspenders, not against pursuers; and therefore excludes not different processes, inferring the same conclusion *super diversis mediis concludendi in facto*.
Stair,

Stair, 22d June 1681, Paton *contra* Stirling. — In a reduction of a disposition upon the act 1621, the defence was, That the pursuer had formerly insisted in a reduction of the same disposition *ex capite inhibitionis*, against which the defender had obtained a decret-*absolvitor*, after which the pursuer was not at liberty to insist upon any new grounds of reduction, or otherwise pleas might be made perpetual; the Lords found, That *competent and omitted* can only be obtruded against defenders, and not against pursuers; and therefore the pursuer was allowed to be heard upon any new ground, whether *in facto* or *in jure*, not alledged in the former process. Fountainhall, 27th December 1692, Kinloch *contra* Oliphant. — A pursuer having extracted an act of litiscontestation, in a process upon the passive titles, for proving divers facts, whereby *gestio pro heredede* might be instructed, and some witnesses being examined; yet he returning to the libel, and offering to prove other passive titles besides behaviour, which was alledged to be contrary to form; yet the Lords found, That the extracted act of litiscontestation did not bar the pursuer from returning to the other branches of his libel, and insisting therein. Forbes, 16th, Fountainhall, 17th January 1711, Watson *contra* Brown. — One offering to renounce when charged to enter heir, it was objected, That she could not renounce, because she had behaved as heir, in so far as she had sold some of her predecessor's lands, which was found relevant for the pursuer to prove, notwithstanding that he had conveyed her before *super eadem re*, as successor in general to her predecessor, and failed in the proof thereof, in respect, that this alledgeance of behaviour, by selling lands, was not formerly libelled or insisted on. Durie, 18th March 1631, Bennet *contra* Bennet. — A missive letter being founded on *per modum probationis* by the pursuer, and excepted against as improbative, not being holograph; an act was pronounced for proving holograph, the result of which was, that the verity of the subscription was ascribed, but no proof that the letter was holograph; and the pursuer then recurring to another plea, that the letter was probative, tho' not holograph, which he alledged he might do, because competent and omitted cannot be opposed to pursuers; the Lords found it still competent to the pursuer to be heard upon this point, That the verity of the subscription being proved, 'tis sufficient to support his claim, without proving holograph. 6th December 1727, Strachan *contra* Farquharson. The exception of *res judicata* being proponed upon a decret of *absolvitor*, by the court of Holland; it was answered, That the pursuit in Holland proceeded upon a copy of the testament, which the Dutch judges looked on as *charta blanca*, as the decret bears, whereas now the testament it self is produced. The Lords repelled the defence of *res judicata*. Harcus, (*Decrets*) February 1688, Binning *contra* Ld. Carse.

A DECRET at an assigney's instance for the whole debt against a cautioner, being quarrelled by him in a suspension, as *ultra* the pursuer's title, in so far as two of the four cautioners were discharged and excepted from the assignation. Answered, The reason was *competent and omitted*, in respect the assignation was given out in process, and decret pronounced thereon *in foro contentiosissimo*. Replied, A defender's omission may bar him from any extrinsick defence to elide an action that is in it self well founded, but a defender's omission can never found a claim or process, and here there is no foundation for making

Bars not objections that resolve into a *denegatio actionis*, or that the pursuer has no ground of action.

ing a cautioner liable for the whole, when he is virtually discharged of the one half. The Lords repelled the answer of competent and omitted. *Harcus, (Decrets)* March 1686, *Crichton contra Murray* of Skirling.

Defences in
jure competent
and omitted.

A PARTY having obtained decret of ejection against one who had violently entred into possession, and also for the double rent, in name of violent profits; in a reduction of this decret, it was alledged, *imo*, That there was no law to make the violent profits of lands, without burgh, to be the double of the rent, which is only competent by custom *in prædiis urbanis*. *2do*, The ejection was prescribed, not being intended within three years, conform to the act of parliament. These reasons were repelled as competent and omitted. *Stair*, 12th December 1661, *Gordon contra Abercromby*. — Two brothers being decerned conjunctly and severally in a decret, as representing their predecessor; the Lords repelled this reason of suspension, That they could only be liable *pro rata* as competent and omitted. *Bruce*, 19th July 1715, *Jaffrey contra Scot*.

Defences upon
facts competent
and omitted.

AN executor being pursued by a relict for her third, suspended the decret upon this reason, That the whole was exhausted by decrets and payments made thereupon to lawful creditors; this reason was repelled, tho' instantly verified, because not proponed in the first instance and so was competent and omitted. *Durie*, 14th November 1627, *Crawford contra Grier*. — A party having obtained a decret upon the passive titles for payment of a bond before the inferior court, and again a decret on suspension before the Lords; the decret was again suspended upon this ground, That the pursuer being executrix nominate to the granter of the bond, her intromissions was payment in her own hand; this was repelled as competent and omitted, the suspender not offering to prove the same by writ or oath, but only by witnesses. *Durie*, 20th December 1632, *Knox contra Knox*. — A decret of removing being suspended, upon an alledgeance of a promise made by the charger to the suspender, not to remove him; the Lords sustained the reason of suspension to be proved by the charger's oath, tho' the promise being alledged made before the decret of removing, which was *in foro contentioso*, was pleaded to be competent and omitted. *Durie*, 27th February 1627, *Muir contra Ld. Rowallan*. — The Lords in the second instance allowed payment by discharges to be proponed and instantly verified, tho' it was omitted in a former decret, the party giving his oath that the discharges were emergent since. *Fountainhall*, 5th February 1679, *Grant contra Grant*.

Where a defence is stated
but not insisted
in.

A RECLAIMING bill being remitted to an Ordinary, and, at a calling before him, the defender having only insisted on one of the points of the bill, which was repelled, and the decret thereupon being extracted; in a reduction of the decret, wherein the defender alledged, That it was unwarrantably extracted, he not having been heard upon the other points of his bill; the Lords found, That the reasons of his bill not being repeted, were competent and omitted, and so not receivable now. *Fountainhall*, 16th November 1711, *Sandilands contra Burnet*.

COMPETENT

COMPETENT and omitted is generally only sustained to bar reduction of decreets recovered in the way of ordinary action, but not to bar a second suspension upon new reasons competent and omitted in the first; but in a case where after the first suspension was discussed, a second suspension was offered, upon writings competent to have been produced in the first suspension, and which look'd extremely suspicious; the Lords found the letters orderly proceeded, and refused to admit these suspect writs in this state of the process, but prejudice to the suspender to make use thereof otherwise as accords of the law. Stair, Gosford, 6th January 1675, Glendinning *contra* Earl Nithsdale and Ld. Westraw.

Competent
and omitted
in suspensions.

COMPETENT and omitted in an inferior court, in matters not ordinarily understood there, is not relevant to bar suspension or reduction. Newbyth, 12th November 1664, Neilson *contra* Murray. Gosford, 4th February 1671, Strachan *contra* Drysdale. Stair, 31st January 1677, Garden *contra* Pearson. Fountainhall, 2d January 1700, Archibald *contra* Wilson. — But where the defence is obvious, *competent and omitted* is sustained. Stair, 13th February 1677, Bagget *contra* Caldwell. — A baron court is not such a judicatory as can give any ground for the objection of *competent and omitted*. Stair, 18th June 1662, Earl Marischall *contra* Bray. — A party suspending a decret of removing obtained before the inferior court, upon a tack standing in his person, the same was repelled, as having been competent, and presumed *dolose* omitted. Durie, 12th July 1636, Burrell *contra* Gilgour. — In a reduction of a sheriff's decret of perambulation, upon this ground, that he did not proceed by an inquest, conform to act of parliament, but by witnesses: This objection was found *competent and omitted*. Stair, 8th February 1662, Lord Torphichen *contra* . — In an inferior court, it having been found relevant to prove by witnesses a naked promise, which is not relevant to be proved by witnesses in our law; yet the defender compearing at the receiving of these witnesses, and not reclaiming; in a reduction of the decret upon iniquity, this objection was found competent and omitted. Stair, 9th February 1672, Wood *contra* Robertson. Forbes, 26th June, 1706, Anderson *contra* Gordon.

Competent
and omitted
in process
before inferior
courts.

COMPETENT and omitted before the Admiral operates not against strangers, *qui utuntur communi jure gentium*. Stair, 23d July 1667, Hanse Jurgan *contra* Captain Logan.

Bars not
strangers.

Powers of the Lord Ordinary.

THE Lord Ordinary may judge of all that is produced before litiscontestation *in modum probationis*, so that if any thing be referred to the oath of party at the bar without an act, the Ordinary takes the oath immediately, and determines; and the same way he can judge of testimonies of witnesses led before inferior courts, and brought before him by suspension or reduction, and produced before litiscontestation. Stair, Dirleton, 27th January 1677, Donaldson *contra* Rhind. Stair, 21st June 1677, Ramsay *contra* Auchinleck.

Form of Process in criminalibus.

A DECRET fining for a bloodwit, upon a probation led in absence before the inferior court, at the instance of the procurator-fiscal, was reduced, the Lords being of opinion, That a decret in absence could not proceed, and that the judge could go no further than to fine the party for contumacy, and to grant warrant to apprehend him till he should find caution to appear personally. Dalrymple, 19th July 1715, procurator-fiscal *contra* Simpson.

FORM of depositions. See Witnes.

WHAT title necessary to carry on a process? See Title to pursue.

WHAT writs may be produced, what parties cited, and what titles made up cum processu? See Quod ab initio vitiosum.

OATH of calumny, oath in litem, oath of party. See these under their respective heads.

FUGITATION in treason. See Forfeiture.

P R O C U R A T O R.

Must have
a mandate.

A PROCURATOR before an inferior court compearing for a defender, took a term to produce her to give her oath, whereupon, she not appearing, was holden as confessed; but, in a suspension, alledging that the decret bore not the procurator to have produced any mandate, she was reponed to her oath. Stair, 24th November 1665, Chalmers *contra* Tinnel.

Implied
mandate.

IT being alledged against a decret of an inferior court, that the defender's procurator had no mandate; Answered, That he produced in process writs belonging to the defender which must presume a mandate. Replied, These writs were antecedently in his hands upon another account. The Lords found the writs did instruct he was the defender's ordinary procurator, which must presume a mandate. Fountainhall, 10th January 1694, King *contra* Seton of Barns.---- An eldest son compearing in his father's cause, and proponing alledgeances, will be repute his procurator, tho' he produce no mandate. Haddington, 14th July 1610, Ld. Wedderburn *contra* Nisbet.

Special war-
rant requisite
when the libel
is deferred to
the pursuer's
oath.

IN a suspension of a sheriff's decret, where the defender's procurator had deferred the verity of the libel to the pursuer's oath, the Lords found, That no procurator could defer the libel to the pursuer's oath, without a special warrant to that effect, and found the production in the process, by the procurator, of the copy of summons given to the defender,

defender, implied no sufficient mandate, and therefore reponed the defender against the sheriff's decreet. Fountainhall, Forbes, 4th January 1709, Hardy *contra* Allan. *Ne quidem in re minima*. Forbes, 18th January 1712, Inglis *contra* Fuller.

PROCURATOR-FISCAL.

A DISCHARGE being granted by a procurator fiscal of the penalty of a bond incurred, by not presenting a person to underly the law, was found valid, tho' without consent of the judge. Home, June 1687, Edmonston and Hamilton *contra* Stevenson.

PROMISSORY-NOTE.

A MERCHANT's note, whereby he obliged himself to pay a sum to another merchant or order, was found to be only a simple ticket, and not of the nature of a bill of exchange, in respect there was not a drawer and acceptor, and therefore null for want of writer and witnesses names and designations. Forbes, Fountainhall, 29th January 1708, Arbuthnot *contra* Scot. — The Lords found, That altho' promissory notes do not require witnesses, yet that they could not be the ground of a summary charge, and that the English acts of parliament *tertio & quarto Annæ Reg. cap. 9*, made before the union, and made perpetual by the *septimo Annæ Reg. cap. 25*, since the union, appeared by their stile, and manner of executing by their *scire facias*, &c. to relate only to England; and therefore found a summary charge on such a note unwarrantable, but thought that it might subsist as a libel, without raising any new process thereupon. Forbes, 6th, Fountainhall, 7th December, 1711, Eisdale *contra* King.

A PROMISSORY note has not the privilege of a bill of exchange, and therefore such a note, in the person of an indorsee found compensable by the indorser's debt. Forbes, 12th February 1708, Bundie *contra* Kennedy of Culzean. — As also arrestable. 2d February 1739, Forbes *contra* Innes.

P R O O F.

Alledgeances how relevant to be proved?

JUDICIAL acts can no otherwise be proved than by the minutes of court. Sinclair, 20th July 1542, *contra* M'Gill. ^{Judicial acts how relevant to be proved?}
 ----- And therefore an exception of *res judicata* was found not relevant
 3 G 2

Alledgeances how relevant to be proved?

levant to be proved, even by the depositions of the judge, clerk, members of court, persons of the inquest, or other famous witnesses. Balfour, (*Writs*) 9th December 1542, Poor wife of Broughton *contra* M'Aulay. — Alledged minutes of process not being written, cannot, *ex intervallo*, be made up by the oaths of the advocates, clerk or judge. Stair, 12th November, 1680, Brown *contra* Wilson.

Legal acts.

POINDING and comprising of goods cannot be proved by witnesses but by writ. Balfour, (*Writs*) 26th March 1542, Blackstock *contra* Wilson. — The Lords found in general, That requisition, or other *actus legitimi*, cannot be proved but by instruments, perfected as to all necessary solemnities, at least by the minutes of the same, under the notary's hand; and tho' the debtor or party concerned might know such deeds were done *de facto*, they are not obliged to know or to declare whether legally done or not. Dirleton, 12th November 1667, Duke and Dutchess of Buccleugh *contra* Scot. — In an action against magistrates, for refusing to obey a charge given them to apprehend a rebel, the Lords assilzied, because there was no execution of the charge given by the messenger, tho' there was produced in process a notorial instrument bearing the fact, and also the letters of caption, with a note under the messenger's hand, bearing that the charge was given as narrated in the instrument; and the pursuer offered further to adnunciate all by the instrumentary witnesses. Forbes's MS. 25th June 1714, Hafwel *contra* Magistrates of Jedburgh. — It being objected in a reduction of a lawburrows, That the oath, touching dread of bodily harm, was not exacted by the messenger, nor any thing mentioned of it in his execution; and the charger offering to prove, That, *de facto*, the said oath was exacted; the Lords refused to receive any other probation than what was contained in the execution. Colvil, March 1584, Ld. Bishopton *contra* . — A requisition made to an heir, was found not valid to infer the double of the marriage, because, at the making the said requisition, the donatar had not the gift in his hand, nor did he show or exhibite it, at least the instrument bore it not, altho' it was offered to be proved by witnesses that it was shown. Durie, 3d July 1622, French and Ld. Thornydikes *contra* Cranston. — A requisition was found null, because it did not bear that the procuratory was read; and altho' the instrument was thereafter mended, and it was referred to the defender's oath that the procuratory was read; yet the Lords refused to sustain the requisition. Hope, (*Wadset*) 7th November 1628, Maxwell *contra* Ld. Innerwick. — It being objected against an order of redemption, That the premonition was null, being by a procurator, and not bearing the procuratory produced; the Lords sustained the order, the pursuer re-producing the procuratory, and proving, by the defender's oath, that it was shewn at the time of the premonition. Stair, 18th January 1662, Veitch *contra* Byel. — But the Lords refused to sustain this to be proved by witnesses. Dirleton, Gosford, 12th January 1677, Jeffray *contra* Ld. Wamphrey. — The execution of a horning, wanting mention of the six knocks in the body of it, but the same being adjected on the margin, and the messenger abiding at the verity thereof as now produced, altho'

Alledgeances how relevant to be proved?

altho' the marginal note was not signed till after registration, but only written; yet the Lords sustained the horning and execution, the party proving by the servants of the keeper of the register, &c. that, at presenting, it had the same marginal note, and also proving by the messenger, witnesses, &c. the truth of the act, viz. That the knocks were given. Durie, 28th March 1637, Scot *contra* Scot. ---- Execution of an inhibition, bearing to be at the dwelling-house, and not mentioning *six knocks*, but only *several knocks*, was not allowed, after registration, to be supplied by a proof that six knocks were actually given; for if one defect may be supplied by witnesses, every defect may be so supplied, and so it would come out, that solemn instruments are not requisite for vouching *actus legitimi*, but that the same may be proved *prout de jure*, like any ordinary fact. Stair, 19th November 1680, Hay *contra* Lady Ballegerno. — The Lords found, That executions of inhibitions, as well as hornings at the mercat-cross, must bear the particular solemnities of three several oyeses and publick reading, and cannot be supplied by witnesses, altho' the execution bear in general *lawfully executed*. Gosford, 10th July 1676, Stevenson *contra* Innes. ---- In the execution of an inhibition, not bearing *three oyeses*, the Lords allowed a proof by the witnesses inserted in the execution; That the three oyeses were truly given, in respect there was some dubiety about the stile of executions. Stair, 21st June 1681, Lundie *contra* Trotter. ---- An inhibition being null, the execution not bearing delivery of a copy; the Lords, after registration of the inhibition, would not admit this to be supplied by a proof, that a copy was truly delivered, in prejudice of a singular successor, who purchased upon the faith that the execution was null. Stair, 28th July 1671, Keith *contra* Johnston. ---- An inhibition executed at Musleburgh, the head burgh of the regality where the lands lay, and at the mercat-cross of Edinburgh, as use is, being quarrelled, for that the execution bore copies to be left at the said burgh of Edinburgh, without mention of Musleburgh; it was alledged for the defender, That it was but a mere omission, and it was offered to be proved by the messenger and witnesses, That, *de facto*, a copy was left at Musleburgh; the Lords found the execution null, and would not supply this defect, it not being so in the register. Marcus, (*Inhibition*) January 1685, Sir Adam Blair *contra* the Creditors of William Rig. ---- An execution of a warning to remove, being challenged as disconform to act 75, parl. 1540, the defect was not allowed to be supplied by witnesses, That, *de facto*, a copy was affixed to the most patent door of the house. Marcus, (*Removing*) February 1684, Threapland *contra* Strachan.

What Proof relevant to support defective Writs?

A BOND being vitiated *in substantialibus*, and consequently presum'd *dolo*se done, the Lords found it not relevant to be proved by the instrumentary witnesses that the writ was vitiated at subscribing; for tho' the tenor of a bond may be proved by witnesses, this is *ex necessitate*, which obtains not in the present case; for in executing writings it is easy to avoid vitiations. Stair, 22d November 1671, Pit-tillo

Alledgeances how relevant to be proved ?

tillo *contra* Forester. — A contract being interlined in several places, and also written on the margin, the marginal notes not being subscribed; the Lords refused to admit the witnesses insert and notary to depone upon the verity of the said notes and interlinings, especially seeing the contract contained warrants for infeftments and reversion of lands, which cannot be proved by witnesses. Colvil, 14th March 1579, Nairne *contra* Sutor. — A bond being vitiated in the sum, the defender was not obliged to bring an improbation of the bond, tho' the pursuer abode by it; but the pursuer was found obliged to approve either by some writ, or by the witnesses insert, or some other lawful adminicle, that the sum which appeared, was the true sum owing and contained *ab initio* in the obligation. Durie, 14th December 1627, Hepburn *contra* Lyle. — A brief whereupon a service was deduced found null, because it was blotted and vitiated in the date of execution, and the pursuer was not allowed to mend the same and bide by it, as is usual in other executions, in respect of the act 113, parl. 1429; which act was found to extend to the date of the execution, as well as to the date of the brief. Durie, 27th July 1626, M'Culloch *contra* M'Culloch. — In a reduction upon the head of death-bed, a disposition was challenged as vitiated in date and place, and it was argued, That in a case of this nature, the date being *inter substantialia*, the presumption *juris & de jure*, is, that the vitiation was done in order to avoid the challenge of death-bed. The defender offered to asstruct the verity of the date by the instrumentary witnesses, which the Lords sustained. In this case the vitiation was of that nature, as scarce to admit of a suspicion of antedating. February 1730, Arrot *contra* Gairden. — A disposition by a mother to one daughter being quarrelled in a reduction at the instance of another daughter, upon these grounds, *viz.* 1mo, That the disposition had been to ocular inspection blank from the beginning, and lately filled up with new ink, tho' more than 30 years old, and it had been designed for a man, it bearing throughout the word *his*, which is now vitiated and made *her*. 2do, That for many years while the mother lived there was no mention of this right, nor for two years after her decease, nor did it so much as bear reservation of a liferent to the granter. The Lords sustained these reasons, and reduced the disposition, unless the defender, in fortification thereof, would offer to prove that her name was filled up therein, and was so read and seen before her mother was on death-bed; and this, tho' the disposition was long before the act of parliament discharging blank writs. Fountainhall, 19th February 1702, Livingston *contra* Livingston.

Where it is of a false date. AN assignation of a false date found null *in totum*, as presumed antedated to make it answer an intimation; and it was not found relevant for the assignee to prove that the assignation was truly executed before the intimation, because our law will not trust witnesses in matters where writ is required, and which therefore are only allowed to be proved by writ. Durie, 29th March 1626, Keith *contra* Robertson. — A disposition being challenged as of a false date, presumed done in order to avoid the objection of death-bed, the defence was,
That

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That by our law a false date doth not annul the deed, unless it appear to be done of design to prejudice a party having interest; that in this case the date was wrong by the ignorance of the writer, who in transcribing the disposition formerly conceived in favours of another, transcribed also the date as it was in the first disposition; but in support of the deed it was offered to be proved by the witnesses insert, that it was truly subscribed by the disponent when in *liege poustie*. The Lords found the defence relevant to be proved by the instrumentary witnesses. Stair, 23d February 1667, *Ld. May contra Rofs.* — A discharge by mistake being copied *verbatim* by a country writer, off a scroll sent from Edinburgh by a writer who had insert his own name as writer of the discharge, and the same coming to be quarrelled by a creditor of the granter's, who alledged, that this was a plain nullity of the discharge, if not a falsehood, not suppleable by witnesses, who are not receivable to prove delivery of money; the Lords having seen a declaration under the granter's hand, that he truly subscribed the discharge, and finding that the probation was only craved to adminiculate and support the writ, they therefore allowed the instrumentary witnesses to be examined touching their seeing the money actually paid. Fountainhall, 23d December 1707, *Irvine contra Maxwell.* — In a like case, the Lords judging themselves tied up by the act 179, parl. 1593, found the writ null, he that was truly the writer being neither named nor designed in the writ. But then it being offered, in support thereof, to be proved by witnesses, that the money was truly paid as mentioned in the discharge, this the Lords sustained. Fountainhall, 11th February 1710, *Irvine contra M'Jore.*

A BOND was found null, which being written on two sides; on that side where the subscriptions were, there was nothing but the clause of registration, the other side was intirely filled up with another hand without any subscription, so that it appeared to have been the last sheet of a writ taken off and filled up upon the back by the pursuer; but being before the act of parliament 1681, the Lords declared, That if the pursuer could adduce writs or adminicles, or witnesses to asstruct the verity of the bond, they would hear him upon the same. Stair, 16th July 1667, *Hamilton contra Syminton.*

IN a reduction *ex capite inhibitionis* of a disposition, bearing a date anterior to the inhibition, but being holograph, which proves not its date, and the defender offering to asstruct the date by witnesses, it was objected, Not competent to prove by witnesses, where the question is not with the heir of the granter, but with third parties; the Lords, before answer, did appoint witnesses to be examined *omni exceptione majoris*. Stair, 21st June 1665, *Braidie contra Ld. Fairny.* — A ticket subscribed by a cedent before witnesses without a date, the witnesses were allowed to prove, that it was subscribed before the assignation, in order to found a defence of compensation against the assigney. Stair, Gilmour, Newbyth, 29th June 1665, *Thornton contra Miln.*

Writ appearing fabricated.

What if the date be wanting, or if it be a holograph writ quod non probat datam?

Alledgeances how relevant to be proved?

Writ in the grantor's hand, how relevant to prove that it was a delivered evident, and that it is still a subsisting obligation.

A MAN pursuing the grantor of a bond to deliver it to him as his evident, because it was signed and delivered to him, and he gave it back to the grantor to get it signed by cautioners, and offering to prove his libel *per testes omni exceptione majores*, viz. four Lords of session; the Lords inclined to admit this probation, altho' the defender contended, That no probation could be admitted, but by writ or oath of party. Haddington, 23d November 1610, Melvil *contra* Murray. — An alledgeance, That a superior had subscribed a precept of *clare constat* in favours of the defender, and delivered it to him, whereby it became his evident, and that the defender, thereafter, delivered it to a servant of the superior's to append his seal thereto, and that it was still in the said servant's keeping, who was now, as donatar, pursuing action of nonentry; this alledgeance, made by way of exception, was found only probable by the superior's oath or writ, and not by witnesses, seeing it tended to make up an evident. Durie, 13th December 1626, Earl Rothes Donatar *contra* Ld. Grant.

CHYROGRAPHUM apud debitorem repertum præsumitur solutum, this presumption cannot be taken away by witnesses, which was found in assignations as well as bonds. Stair, 14th December 1666, Fairly *contra* Creditors of Dick. — Witnesses *ex officio* were sustained to take away an exception, that the bond craved to be paid was *instrumentum apud debitorem repertum*; the manner of the delivery being most special, and to be proved by the debtor's own curators, who transacted for him in his minority. Gosford, 15th June 1671, Elies *contra* Carse. — The delivery back of a bond in trust uncanceled, is no otherwise to be proved, but *scripto vel juramento* of the receiver, if no force be alledged, and witnesses cannot be here received *ex officio*. Gosford, 3d July 1677, Aikman *contra* Aikman.

Proof of homologation.

A DEFUNCT having in testament ordained his relict to bruick all his lands during her life, she only giving to her son a plenished room; in a removing at the son's instance against her, the Lords found, That the homologation of the testament, viz. the receiving of the room plenished in implement of the said clause, ought to be proved by writ or oath of party, and not by witnesses, altho' it consisted *in facto*. Durie, 29th June 1632, Straiton *contra* his Mother. — A promise made by a woman in her widowity, to pay a bond granted by her *stante matrimonio*, found probable by witnesses in order to support the bond, tho' it was above L. 100 Scots. Spotiswood, (*Probation*) 5th February 1636, Acheson *contra* Herring. — The contrary, tho' the bond was within L. 100 Scots. Stair, Dirleton, 10th December 1675, Bryce *contra* Kirkpatrick.

What Proof relevant to take away Writ?

A writ in the grantee's hand, how relevant to be proved that it was never a delivered evident?

THAT a bond was deposited until performance of a certain condition, and that the charger had taken the same out of the depositor's charter-chest, without performing the condition, was not found relevant to be proved by the oath of the alledged depositor, but only by the

Alledgeances how relevant to be proved ?

the charger's oath. Durie, 22d February 1627, Williamson *contra* Tennent. Gosford, 13th July 1670, Rutherford *contra* Rutherford. — It being alledged against a bond, That it never was a delivered evident, but surreptitiously taken out by the creditor from amongst the debtor's writs, this was not found relevant to be proved by witnesses ; but the Lords *ex officio* examined the creditor upon the fact. Durie, 21st March 1628, Scot *contra* Creditors of Dishington. — It being alledged against a writ, That it never was a delivered evident, but deposited in a third party's hand, who had unwarrantably given it up to the pursuer ; the question was, Whether this deposition was relevant to be proved otherwise than by the oath of the party in whose favours the writ was conceived, he having the same in his hands ; and it was found, That seeing the writ was not produced by him to whom it was granted, but by a third party, in whose favours a clause therein was conceived ; in this case the deposition might be proved both by the writer and witnesses insert. Stair, 5th July 1662, Drummond *contra* Campbell. — A disposition that had been writ out with a blank for the disponee's name, and filled up with another hand, and different ink, was challenged as never having been a delivered evident, and it was conceded on, that the deed was in the granter's possession, at the time of his death, intromitted with by the defender, who caused fill up his own name therein, after the granter's decease, which was offered to be proved by the writer, who filled up the blank, and by other persons who were present ; the Lords found the alledgeance could only be proved *scripto aut juramento* of the defender. Gosford, 10th January 1673, Laury *contra* Drummond. — Found, That altho' writ cannot be taken away but by writ directly, yet it may be taken away by a reduction *ex capite metus, doli aut minoris ætatis* and lesion ; and that, in such pursuits, the reasons being in fact, and libelled, either upon force or circumvention and fraud, are relevant to be proved by witnesses ; and therefore, that a reduction upon this reason, *viz.* That the disposition in question was found amongst the defunct's papers at his decease, and was intromitted with, and filled up by another, may be proved by witnesses, as being *ex capite doli*. Dirleton, 17th January 1677, Caribber *contra* Fordel. — The like. Dirleton, 16th January 1677, Stewart *contra* Riddoch — It being objected against a disposition, That it never was a delivered evident, it was found relevant to be proved by witnesses, That the disposition was in the granter's possession the time of his death, without a clause dispensing with the not delivery. Stair, 13th February 1679, Cathcart *contra* Ld. of Corfclays. — A bond of provision being granted by an eldest brother to one of his sisters, conform to agreement betwixt his father and him, when the father disposed the estate to him, and the bond not being delivered to the sister herself, but to the father, who trusted it to the custody of a friend, out of whose hands the daughter (who was now married below her degree, and without her father's consent) got it *viis & modis*, and now charging for the sum ; the Lords ordained the witnesses in the bond with the father and his said trustee to be examined *ex officio*, if there was any deposition, and what were the terms and

Alledgeances how relevant to be proved ?

conditions of the deposite, and how it went out of their hands ; this, the author says, was looked upon as a dangerous preparative. Fountainhall, 30th December 1703, Stewart *contra* Stewart. — It being alledged against a bond of provision, That when the granter was on death-bed, he gave his wife warrant to take out the bond and cancel the same ; this was found relevant to be proved by the wife and other witnesses. Stair, 7th November 1673, Chisholm *contra* Chisholm.

Or that it
was retired
by the debtor.

IN a competition of the creditors of Cromarty, it was alledged against an assignation to a comprising in favours of Joseph Brodie, That it was *instrumentum apud debitorem repertum*, and so extinct by being in the possession of the common debtor, who could not *ex post facto* revive it, by delivering the blank assignation. Now, that the assignation and apprising were once retired by the debtor, was offered to be proved by witnesses, and, in support of this offer, it was observed, that the assignation was not delivered to the assignee for two years after its date. Answered, The alledgeance is only relevant to be proved *scripto vel instrumento*, and it were a dangerous preparative to take away mens rights by witnesses, it being customary for apprisers to have blank assignations lying by them till they meet with a merchant. Replied, The assignee being dead, his oath cannot be had, but it is offered to be proved by the cedent and other witnesses, That the apprising with the assignation was delivered to Cromarty. The Lords found the alledgeance could only be proved *scripto vel juramento*. Marcus, (*Comprising*) February 1688, Brodie *contra* Creditors of Cromarty.

That a mutual contract
was deposited
upon terms.

CONSIGNATION of a mutual contract, *ad hunc finem*, till the liferenter should subscribe, is relevant to be proved by the witnesses insert ; and the same being proved, the Lords found, That either the party behoved to procure the said subscription, or otherwise the contract behoved to fall. Hope, (*Contract*) January 1611, Ker *contra* Home. — It being alledged in a process, That a minute in a mutual contract, which was in the hands of the writer, was lodged there till such and such things should be performed by the other party, and this alledgeance offered to be proved by the witnesses and writer ; the Lords repelled the same, and found it unreasonable to take such depositions, to destroy the minute, against consent of the party, altho' they are in use to take their declaration to confirm a writ, and for corroboration thereof. Durie, *penult.* June 1625, Crawford *contra* Vallance's heirs. Durie, 23d June 1626, Maxwell *contra* Lord Drumlanrig.

That a bill
was blank in
the drawer's
name when
accepted.

A BILL's being blank in the receiver's name the time of accepting, found relevant to be proved only by his oath or writ. Forbes, 21st June 1711, Brand *contra* Tenants of Riccartoun. — In a competition betwixt an onerous indorsee to a bill and an arrester, it having been found relevant to prefer the arrester, That the bill was not completed by subscription of the drawer at the time of the arrestment ; the same was

Alledgeances how relevant to be proved?

was found relevant to be proved *prout de jure*. 14th February 1734, Neilson *contra* Russell.

In a competition upon a defunct's executry, it being alledged against a creditor, That the commissary's deliverance upon his application was antedated, in order to bring him in within the six months, this alledgeance was found relevant to be proved by the commissary's oath. December 1730, Robertsons *contra* Dunbar.

A CONDITION not being engrossed in the deed, but only at signing agreed upon, was found not relevant to be proved by the witnesses insert. Colvil, 29th October 1574, Wauchop *contra* Hamilton.—The same was found in a decreet-arbitral touching some verbal promises, alledged made by the arbiter at subscribing. Colvil, 16th November 1574, Ld. Dalgatie *contra* Ld. Urie. — Whatever can take away a decreet, *v. g.* *pactum de non petendo*, &c. can no otherwise be proved but by writ or oath of party. Colvil, May 1583, Countess of Argyle *contra* Sheriff of Murray. — Burgy had granted a bond to the Earl of Murray for L. 10000, for desisting from a criminal process against him, this bond was desired to be reduced, as having been granted at the intercession of friends to save the Earl's honour, who, tho' he was not the pursuer, yet was an assistant in the pursuit, but with no view to be exacted, as was offered to be proved by certain noblemen that had been communers; found the bond could not be taken away by witnesses, however honourable. Durie, 21st January 1630, Earl Murray *contra* Dunbar of Burgy. — A purchaser who was bound by the minute to pay a certain sum, or to assign sufficient bonds to the extent, offered a bond of the town of Edinburgh's as a part of the price, the seller excepted against this bond, alledging, it was agreed betwixt them, that this bond should be no part of the price; this was found relevant to be proved by the writer and witnesses insert in the minute, which will not be drawn, in example as to any full and extended writ, for altering any clause therein, or for adding any omitted. Stair, 5th January 1667, Cheap *contra* Philip. — It being alledged in a suspension of a contract of victual, That it was delivered 20 miles short of the place where it should have been delivered, which, tho' not contained in the contract, yet was offered to be proved by the writer and witnesses, and so the seller was liable *arbitraria actione de eo quod certo loco*; the Lords found the alledgeance only relevant to be proved *scripto vel juramento*. Fountainhall, 28th November 1684, Brisbane *contra* Merchants in Glasgow. — A purchaser of lands having, as part of the price, assigned the seller to a sum due by bond, and he taking a bond of corroboration payable at the next following term, because the cedent had promised to warrant his payment, in case he would forbear for that space, and the debtor having broken in the mean time, the said promise, to warrant him, if he would forbear till the term, was found relevant to oblige the cedent to pay; but then it was also found, That the promise could only be proved by the cedent's own oath, seeing he had not adhibited writ as he might have done, but the Lords allowed the assigney to adduce these who were witnesses to the communing to confront the cedent. Fountainhall, 19th

Verbal pactions agreed upon at signing, inferring conditions, limitations, &c. how relevant to be proved?

Alledgeances how relevant to be proved?

January 1703, *Weir contra Ruffel*. — A decret-arbitral having been pronounced upon a submission betwixt some children of a defunct, on the one side, and a single person on the other, decerning a considerable sum to be paid to the children; when the money came to be paid, they refusing to discharge the whole claim competent to the defunct, but only their own proportions, there having been another brother, now deceased, to whom they had made up no titles; the Lords found it relevant to be proved by the oaths of the arbiters and communiters, That the whole claim due to the defunct, was meant to be submitted, and that the sum decerned for was in satisfaction of the whole. Fountainhall, 22d January 1684, *Davidson contra Town of Edinburgh*.

Verbal pactions ex inter-
vallo expressi
or implied,
taking away
writ or other
right.

TRANSACTIONS and compositions, relative to written obligations, cannot be proved by witnesses, but by writ only. Balfour, (*Writs*) 21st January 1540, *Lord Somervell contra*. — An obligation being established by writ, the Lords found, That any transaction thereupon, or exoneration therefrom, can only be proved by writ, and not so much as by the witnesses insert in the obligation itself. Balfour, (*Writs*) 17th February 1549, *Ld. Ker's contra Panter*. 14th February 1549, *Minister of Hales contra Abbot of Newbottle*. — A transaction whereby part of a sum in a bond was given down, and delivery of goods worth the *superplus*, was found relevant to be proved by witnesses, altho' in a suspension. Nicolson, (*Transaction*) 11th July 1623, *Torrence contra Steel*. — An obligation for an L. 100 was found innovated by an act in a town's books, whereby the debtor, being prisoner, acted himself to pay L. 90, altho' the act had no relation to the obligation; and it was admitted to be proved by witnesses, viz. the bailiff and clerk, That the act was made for payment of the sum contained in the obligation. Haddington, 8th February 1610, *Wintham contra Crombie*.

RENOUNCIATION of a tack, cannot be proved but by writ or oath of party. Durie, 19th February 1639, *Ld. Craigmillar contra Chalmers*. — An alledgeance, That a tacksman had in effect renounced his tack, by payment of a greater duty, was found not relevant to be proved by witnesses, but only by writ or oath of party. Haddington, 23d July 1605, *Ld. Schaw contra Palmer*. — After decret of removing against a party, who was alledged to have been thereafter tolerated to sit and labour the ground by a new paction; the Lords found, That the said agreement could not be proved by witnesses, but by writ only. Balfour, (*Probation*) 5th December 1534, *contra*. — A command to do service after warning, can only be proved *scripto vel juramento*. Hope, (*Writ*) (*Removing*) 11th December 1616, *contra*. — In a reduction of a decret of removing, the Lords found one reason relevant, viz. a promise made by the pursuer, that the defender should bruik for a year; as also they found, That the said promise being made after the warning, and before sentence, might be proved by witnesses. Hope, (*Removing*) (*Promise*) 19th March 1616, *Edmonston contra Fullerton*. — A messenger who suffered a prisoner to escape, alledging a posterior paction with the party, whereby he was bound to apprehend and incarcerate

Alledgeances how relevant to be proved ?

incarcerate the prisoner, which he had now done, and in which case the party was to pass from any action against him for letting the prisoner escape; the Lords found this paction to be of the nature of a promise, and so not relevant to be proved by witnesses, but only *scripto vel juramento*. Fountainhall, 20th November 1703, Hyslop *contra* Smart. ---- In an action of spuilzie, the defender alledging, That a man in his name transacted with the pursuer, who agreed that he the defender should intromet with the goods in question; the alledgeance was found relevant to affoilzie him from the spuilzie; but the said alledgeance was found only relevant to be proved *scripto*, and not by witnesses. Balfour, (*Writs*) 11th February and 6th March 1533, Cranston *contra* Home.

THE cause of a bond being proved by the creditor's oath to be a bargain, the conditions of the bargain may be proved by witnesses. Proof to redargue the cause of granting, condescended on in the writ. Stair, Gosford, 22d January 1674, Sim *contra* Inglis. ---- In a pursuit upon a bond, bearing *borrowed money*, it was offered to be proved by the pursuer's oath, that the cause of the bond was not *borrowed money*; and the narrative of the bond being thus redargued, the Lords found the true cause might be proved by the instrumentary witnesses. Stair, 22d February 1676, Brown *contra* Laurie. ---- A bond not bearing *resting owing*, but only an obligation to pay, without assigning any cause; it was found, That the true cause might be proved by the witnesses insert, so as to affoilzie the granter, if it was found to be *ob causam datam, causa non secuta*. Durie, 26th July 1622, Davidson *contra* Ld. of Buckie. ---- A man who had granted bond for a sum, as borrowed money, to a party now deceased, who was executed for a crime, but, before his execution, had assigned the bond; and the debtor alledging, in a bill to the Lords, That, notwithstanding the narrative, it was truly a salary for agenting his business; the Lords refused to examine *ex officio* the writer and subscribing witnesses touching the true cause of the bond, that this being proved, it might be declared null, *conditione causa data, causa non secuta*; for they considered, that whatever might be done for expiscation, where the writ bears only onerous causes in general, yet when it bears *speciatim ex causa mutui*, the same cannot otherwise be cancelled, save only *scripto vel juramento* of the creditor. Fountainhall, 19th June 1696, Bruce *contra* Murray ---- A party who was charged on his accepted bill, offering to prove, by the charger's oath, That the cause of granting the bill was for some goods bought from him, and that being acknowledged by him, then offering to prove, by the witnesses present at the bargain, that the quantities and prices agreed on would not extend to that sum by far, unless he proved delivery of a greater quantity; the Lords found, That the bill being accepted simply, he had renounced all objections against the debt, except what he could prove by the charger's oath, so that he could not divide his probation, partly by oath and partly by witnesses, but must refer all, both quantities, prices, conditions, &c. to his oath, and refused the heteroclite probation he offered. Fountainhall, 2d January 1712, Jeffray *contra* Robertson. ---- In order to restrict a charge upon a bond bearing borrowed money, it was found relevant to prove by

Alledgeances how relevant to be proved ?

the charger's oath, That the bond was for an apprentice-fee, and by witnesses, that he beat the apprentice, and put him away with evil usage before he had served out his time. Stair, 15th June 1665, Aikman *contra* . — A bond, bearing borrowed money, being of the same date with indentures passed betwixt the debtor's brother, as apprentice to the creditor, and the said creditor, was presumed to have been granted for the apprentice-fee discharged by the indentures, the debtor ascribing the same by the writer and instrumentary witnesses in the said indentures and bond, which their Lordships found relevant to reduce the bond *pro tanto*, and proportionally to the time the apprentice was not alimented, educated and instructed by his master, according to the indentures. Forbes's MS. 5th June 1714, Gun *contra* Fraser. Found, by a narrow plurality, That witnesses might be admitted to prove, That one of the co-obligants was cautioner only, and the whole money applied to the other's behoof. N. B. The process was begun against the obligant himself, but he died soon after, by which the pursuer lost the benefit of his oath. Fountainhall, 3d February 1697, Drummond of Riccartoun *contra* the Creditors of Sir William Nicolson.

Proof to redargue other clauses in writs.

IN a reduction of a disposition upon the head of fraud, in respect, tho' it appears to be an absolute disposition, yet it was designed by the granter to contain a reversion, and he offered to prove, by the writer and instrumentary witnesses, That it was read so to him at signing. The writer and witnesses were examined before answer. Stair, 2d July 1667, Allan *contra* Fairie. — That a gift of liferent-escheat was antedated, and simulate to the rebel's behoof, was found probable by the oath of the superior and witnesses insert in the gift. Stair, 19th June 1669, Scot *contra* Langton. — A cautioner who was illiterate, and could not write, offered to prove by the notaries and witnesses, That he only gave warrant to them to subscribe for him as cautioner for 1200 merks, whereas a much larger sum was filled up in the bond; the Lords would not receive the reasons to be proved in the ordinary way, by witnesses, but, *ex officio*, ordained the comuners, notaries and witnesses to be examined, that they might consider the clearness and pregnancy of their testimonies, whether this writ was read to the suspender when he gave warrant to subscribe, and what was read for the sum, and on what terms he gave warrant to subscribe. Stair, 25th January 1670, Hadden *contra* Campbell. — A decreet-arbitral, bearing to grant a renunciation, with absolute warrandice, was found so far reducible as to bear only warrandice from fact and deed, upon the arbiters depositions, after they were *functi*, that they decerned no more; and it being natural for such writs to carry only warrandice from fact and deed. Gosford, 9th December 1671, Hays *contra* Hay. — A minor marrying another minor, and the wife, with consent of her spouse, and the father taking burden for his son, having granted a discharge to her tutors; in a reduction of this discharge upon an alledgeance, (which the pursuer offered to prove by comuners and witnesses) that the discharge was granted upon trust; the Lords found the alledgeance only probable *scripto aut juramento*. Home,

November

Alledgeances how relevant to be proved ?

November 1683, Lady Ballegerno *contra* Hays. — In a reduction upon the act 1621, of an assignation, which bore not only for love and favour, but for other causes and considerations; and the assigney offering to prove the onerous causes, yet the Lords sustained the reduction, because they would not allow the assigney to prove contrary to the terms of his own writ. Fountainhall, 7th December 1710, Daes *contra* Fullerton.

THE Lords refused to sustain this reason of reduction of a decret, That the clerk had drawn the interlocutor, contrary to the testimonies of the witnesses, because this would bring all decreets over head, by fixing a pretended guilt on the clerks. Fountainhall, 30th November 1678, M'Kenzie *contra* Graham. — A decret pronounced *in foro contradictorio & in presentia*, being fought to be reduced on this ground, that it was extracted by the clerks unwarrantably, contrary to what was done by the Lords; it was found relevant to prove this alledgeance by the oaths of the advocates on the other side. Stair, 6th July 1666, Tosh *contra* Cruikshank.

A NUNCUPATIVE testament cannot be proved by witnesses to take away a former legacy constituted by writ. Durie, 18th February 1631, ^{Nuncupative legacy.} Houston *contra* Houston.

Payment how relevant to be proved ?

A DEBT being proved by writ, no part thereof can be proved paid by witnesses, and the act of sederunt anent probation of payment of sums under L. 100 by witnesses, found not to be understood of sums founded on writ. Haddington, 15th November 1622, M'Gill *contra* Forret. — The same, tho' the bond was but for the sum of L. 40 Scots. Durie, 15th July 1624, Nisbet *contra* Short. — The like, with regard to an alledged payment of five merks, in name of annualrent. Durie, 1st July 1626, Hay *contra* . Durie, 4th July 1632, Dalrymple *contra* Ld. Closburn. — A sum of money, and a pipe of sack, and a tun of beer being all contained in one ticket; the Lords, in a process against the granter's heir, for payment of the the money and prices of the goods (which the defender alledged to have been paid to the creditor himself now deceased) found, That the payment of the money ought to be proved *scripto vel juramento*, but that the payment of the prices of the goods might be proved by witnesses, tho' all was in one ticket. Durie, 16th December 1626, Finlayson *contra* Executors of Lauder.

A TICKET bearing only principal and expences, and the creditor after the term of payment declaring by a writ under his hand, That he would supersede seeking payment thereof till a term long thereafter, the debtor always in the mean time paying termly the annualrent; the Lords found, That the real payment of the annualrents at these terms might be proved by witnesses *omni exceptione majores*. Nicolson, (Payment) 29th March 1623, Lord Semple *contra* Somervell. — In a reduction of a contract entred into by a minor *majorennitate*; *proximus*, the Lords considering his quality, that he was a publick notary the time of signing the contract, and was the drawer of it himself, they sustained the defence, That he had homologated the contract

Alledgements how relevant to be proved ?

since majority, by payment of annualrent, to be proved *prout de jure*, notwithstanding it was to fortify a contract reducible in law, whereby a minor had disposed his heretage. Spotiswood, (*Minor*) 20th July 1636, Gardner *contra* Chalmers. --- In a declarator of irritancy *ob non solutum canonem*, founded upon a clause irritant in the deed, payment of the canon was found not relevant to be proved by witnesses, altho' the duty was small. Haddington, 23d November 1609, *Ld. Romanno contra* Nisbet. Durie, 1st February 1631, Calpie *contra* Kennedy. --- *N. B.* Payment of feu-duties found relevant to be proved *prout de jure*. Dirleton, 9th July 1667, Hamilton *contra* Smith. But there must be some mistake in this.

A Man being charged for a sum upon his registred obligation, and suspending upon an article in the pursuer's husband's compt-book, and offering to support the same by witnesses, the payment was admitted to probation by witnesses. Haddington, 13th January 1609, Home *contra* Brown.

Where it is
not constituted
by writ.

AN exception of payment of a sum, tho' exceeding *L. 100*, was admitted to be proved by witnesses, the libel being proved in the same manner, there being no writ. Haddington, 19th June 1605, *contra*. --- A tenant who had no tack, was allowed to prove by witnesses payment of his money-rent, not exceeding *L. 100* termly. Stair, 7th January 1662, Earl of Lauderdale *contra* Tenants of Swinton. --- In a pursuit for payment of the price of a horse, payment by witnesses was found relevant; and two witnesses having deponed, That they saw the defender deliver 20 dollars to the pursuer about a month after the bargain; this was sustained, unless the pursuer would prove the defender was owing him that sum upon a separate account. Marcus, (*Probation*) 8th December 1687, Home *contra* Hislop. --- A purchaser of land by a verbal bargain, alledging he had paid the price, after which there was no *locus pœnitentiæ*; this was found only relevant to be proved *scripto vel juramento*, because witnesses could not well know whether the money was paid in contemplation of the bargain, or whether the seller reserved himself freedom to refile upon repaying the money. Fountainhall, 23d December 1697, Laurie *contra* Craik.

Delivery of
fungibles in
implement of
an obligation
in writ.

PERFORMANCE of an obligation in writ, by payment or delivery of victual, or other fungibles in terms thereof, is relevant to be proved by witnesses. Haddington, 26th July 1620, Hamilton *contra* Lady Pittenweem. Nicolson, (*Witness*) 13th January 1620, Little *contra* Hillstones. Durie, 25th November 1624, Bisset *contra* Bisset. Spotiswood, (*Probation*) 28th June 1631, Executors of Fergusson *contra* Campbell. Durie, 23d July 1633, Lady Aberzeldie *contra* her son. Stair, 7th January 1662, Earl Lauderdale *contra* Tenants of Swinton. Fountainhall, 14th June 1687, Agnew and Muir *contra* Agnew.

Delivery of
fungibles in
satisfaction of
an obligation
for a sum of
money.

IN a pursuit for 500 merks contained in a registred bond, an exception of payment of *L. 160*, by delivery of a tun of wine of that price, found relevant to be proved by famous witnesses named in judgment, the

Alledgeances how relevant to be proved?

the payment being made before the term of payment in the obligation, and it being done before the act, That witnesses should not prove above *L. 100.* Haddington, 9th March 1610, Laurie *contra* Hay. --- Delivery of corns, cattle, &c. by a tenant in satisfaction of his rent, may be proved by witnesses, even against an arrester. Spotiswood, (*Probation*) 16th January 1629, Bennet *contra* Foulden. --- Delivery of victual in satisfaction of a bond of borrowed money, found not relevant to be proved by witnesses. Haddington, 8th February 1606, Tennant minister *contra* Lord Traquair. Durie, 11th December 1632, Porteous *contra* Lord Harries. Stair, Dirleton, Gosford, 11th December 1674, M'Duff *contra* Stewart. Marcus, (*Contracts of Marriage*) February 1683, *contra*

Intromission how relevant to be proved?

A HUIRD being sued for by the King's donatar, altho' it exceeded *L. 100*, yet was admitted to probation by witnesses *in favorem fisci*. Haddington, 27th July 1605, Murray *contra* Knoblo. --- An executor pursuing an intrometter with the defunct's money, the Lords found, That he ought to prove the intromission by writ or oath of party, but not by witnesses. Durie, 25th November 1624, Bisset *contra* Bisset. --- The contrary found afterwards. For facts must be always relevant to be proved by witnesses, where it was not the party's fault who is seeking the proof that writ was not adhibited. Gosford, 12th, Stair, 13th December 1671, Moffat *contra* Phin. --- Intromission with mails and duties proponed by a debtor against his creditor in an infeftment of annualrent, may be proved by witnesses, because to prove the deeds and facts of other parties writ cannot always be had. Stair, Gosford, 4th February 1671, Wisheart *contra* Arthur. Stair, 2d December 1675, Thomson *contra* Moubray. --- The like, where the intromission was both with victual and money-rent. Forbes, 25th January 1711, Baillie *contra* Menzies. --- A bag of money lying by a man at his death, being confirmed by one of his two daughters his executrix; in a compt and reckoning with the other sister's representatives, found not relevant to prove by witnesses, that the money was equally divided betwixt the two sisters of consent, and that it was afterwards confirmed in order to avoid vitious intromission. Forbes, Fountainhall, 20th December 1709, M'Kenzie *contra* Lord Eli-bank.

Where the proof is to make the intrometter liable.

IN a competition betwixt a publick and a base infeftment, the Lords sustained it relevant to be proved by witnesses, that annualrent had been paid in order to make the base infeftment publick. Durie, 11th February 1630, Ross *contra* Eliot. --- A pension being granted payable out of feu-duties, it was found relevant to the pensioner to prove by witnesses his uplifting the feu-duties, in order to clothe his right with possession. Durie, 17th December 1628, Chalmer *contra* Ld. Craigievar.

Where it is to benefit the intrometter.

Alledgeances how relevant to be proved?

What Proof relevant in an Exhibition of Writs.

A MAN being pursued as depositor of a bond put in his hands by the pursuer for the pursuer's use, the Lords found, That the deposition was relevant to be proved by witnesses, as the having of any writ is probable that way. Durie, Spotiswood, (*Exhibition*) 14th February 1629, Farquhar *contra* Wallace. — In an improbation where litiſcontestation was made by taking a day to produce, the Lords found this exception relevant to be proved by witnesses, viz. That the writs called for were redelivered to the pursuer since litiſcontestation. Hope, (*Improbation*) 18th December 1621, Ld. Dunipace *contra* Pentafken. — In exhibitions of writs the Lords found, That the pursuer ought to libel, that the defenders called as havers, either had the writs the time of citation or since, which may be proved by witnesses; or, if he insist that the defender had the same at some time before the summons, that he ought therewith to conjoin *quod dolo desit possidere*: Which last part was found only relevant to be proved by writ or oath of party. Durie, Spotiswood, (*Exhibition*) 30th January 1629, Captain of Crawford *contra* Ld. Lamington.

Deposition being acknowledged, the Terms how relevant to be proved?

A BOND being deposited in a third party's hands upon some conditions, it was found, That the conditions might be proved not by the granter's oath or writ, but by the depositor's oath, whose sworn declaration was found sufficient to infer sentence according to the conditions as he should depone. Durie, Hope, (*Exhibition*) 22d January 1624, Learmouth *contra* Alexander. — The like was found in a parallel case, where the granter offered to prove the condition by witnesses insert; which was repelled, and the depositor's oath ordained to be taken, tho' he was one of the witnesses. Durie, 5th March 1624, Hay *contra* Wright. — When the terms of deposition are in writ, the oath of the depositor is not received to prove contrary thereto. Stair, 24th February 1675, Cowan *contra* Ramsay.

Nuda emissio verborum.

IT being objected against a witness, that he was ultroneous, in coming to the messenger and desiring himself to be cited, the Lords considered, that this was *nuda verborum emissio*, the import of which might be easily mistaken; the two expressions being very near, and yet differing in their import, *If I were called I know that matter*, and, *Call me and I'll prove that matter*; and therefore they found it could only be proved by the witnesses own oath, but allowed a diligence for citing the messenger and witnesses to be present at deponing. Fountainhall, 13th July 1700, Goodin *contra* Murray. — It being sustained as a relevant objection against a witness, That after citation he had said he would

Alledgements how relevant to be proved?

would swear best for the party that would pay him what was due to him; the Lords found this could only be proved by the witness's own oath, but allowed witnesses to be adduced to confront him; for not only was this a *nuda emissio verborum*, but if witnesses were to be admitted in such a case, there might be a *progressus in infinitum*. Fountainhall, Forbes, 17th June 1707, Livingston *contra* Menzies.

Naked Promise.

ALTHO' a contract of marriage cannot be otherwise proved than *scripto*, yet the Lords found, That promises of tocher may be instructed by witnesses. Maitland, Balfour, (*Witnesses*) 15th February 1551, Drummond *contra* Bisset. — A promise to pay L. 100 Scots, found relevant to be proved by witnesses. Durie, 25th February 1636, Ld. Ernock *contra* Ld. Preston. — The contrary. Durie, 25th March 1629, Ruffel *contra* Paterson. — A promise to pay 100 merks found not relevant to be proved by witnesses; but this was after 17 or 18 years. Gilmour, 13th February 1664, Cheyne *contra* Keith. — In a process for payment of L. 100, which the pursuer alledged was paid by him for the behoof of the defender's predecessor, and of which the defunct promised to relieve him, the Lords would not admit witnesses to prove the promise, especially after so long a time, and after the person's death, who, if alive, might have either qualified the promise, or have instructed payment, it being ordinary to transact such affairs without writ. Stair, Gosford, 3d July 1668, Donaldson *contra* Harrower. — A wife's promise to pay her husband's debt due by bond, was found relevant to be proved *prout de jure*, the sum being within L. 100. Gilmour, June 1663, Craw *contra* Cuthbertson. — A promise to be cautioner for another, was found only relevant to be proved *scripto vel juramento*, tho' the debt was within L. 100; and the Lords in general were of opinion, That no merely gratuitous promise is relevant to be proved by witnesses. Stair, Gosford, 19th January 1672, Deuchar *contra* Brown. Colvil, 26th November 1580, Auchinleck *contra* Gordon. — A verbal promise of an annual payment, tho' of small value, to be made during the life of the party claiming on the promise, cannot be proved by witnesses, nor otherwise than by writ or oath of the promiser, tho' payment has been made for some years according to the alledged promise. Durie, 4th March 1636, Lillie *contra* Ld. of Innerleith.

FOUND, That a promise made by the pursuer to the defenders, that their not compearance to give their oaths should not prejudice them, could not be proved by witnesses, but by writ or oath of party. Hope, (*Promise*) 15th December 1615, Tenants of Kirkbain *contra* Hog.

THE Lords admitted witnesses to prove, That a person in prison was set at liberty at the defender's desire, and upon his promise to re-produce him at a certain day, tho' it was contended, that a promise can only be proved *scripto vel juramento*, except where it is accessory to a

Promise
merely gratuitous.

Promise with
regard to judicial steps.

Promise in
consequence
of a favour
granted.

Alledgeances how relevant to be proved ?

bargain probable by witnesses. *Harcus, (Probation) 7th December, 1687, contra Provost Johnston.*

Promise of marriage.

IN a process at a woman's instance for aliment, against the representatives of a defunct, to whom she had bore a child under an alledged promise of marriage, the Lords thought it of dangerous consequence to sustain the probation of a promise of marriage after the man's decease, otherwise than by writ ; seeing the defenders being strangers to the fact could not know how to object against the witnesses, or propose relevant interrogatories, or alledge relevant defences ; and the case being of itself most unfavourable, therefore they refused to sustain any other manner of proof but writ. *Gosford, 19th July 1670, Cockburn contra Logan.* — In a process of adherence before the Commissaries, the pursuer offered to prove a promise of marriage and subsequent copulation ; which the Commissaries sustained, the promise relevant *scripto vel juramento*, and the copulation *prout de jure*. Against this the pursuer applied to the Lords by advocacy, insisting, That she should be allowed to prove the promise by witnesses. The Lords refused the desire of the bill. *19th February 1732, Katharine Harvie contra Crawford of Milton.*

Nuncupative Legacy.

A NUNCUPATIVE legacy of 200 merks found relevant to be proved by witnesses *omni exceptione majores*. *Haddington, 9th November 1610, Russel contra*

Mandate, Order, Allowance, Tolerance, &c.

IN a debate about a piece of land lying upon the marches of two neighbours, the pursuer alledging, That the other party's tenants who possessed the lands in controversy, paid to the pursuer's predecessors mails for the lands divers years together, by direction and command of the defender's predecessors ; the Lords found, That this direction or command could only be proved by writ or oath of party, and not by witnesses. *Durie, 13th February 1634, contra* . — In a pursuit for payment of the price of certain bolls of victual, which the pursuer alledged he had delivered by the defender's direction to his servant ; the Lords found the direction could only be proved *scripto vel juramento*. *Durie, 28th November 1638, Brown contra Hamilton.* — The like found also in case of a forthcoming, where the arrestee alledging, That he paid a great part of the debt to tradesmen by his creditors direction, this direction was found not relevant to be proved by the oaths of the said tradesmen, altho' the particulars were but small, the debt being constituted by writ, and the tradesmen could not be allowed to depone to their own benefit. *Durie, 2d February 1642, Murray contra Merchinston.* — An accompt for the reparation of a house being pursued against the possessor, not the proprietor, it was found relevant to be proved by witnesses,

Alledgeances how relevant to be proved ?

nesses, That the defender was the employer to make him liable in the sum. Stair, 21st July 1668, Thomson *contra* Earl Glencairn.

A PARTY having put his horse into a stabler's custody, with express orders to keep him within at hard meat, and the hostler notwithstanding putting him out to the grass, where he was lost; the Lords found the above order probable *prout de jure*. Newbyth, 29th January 1667, Scot *contra* Gib.

A GOALER's defence for letting a prisoner go, being, That he did it by allowance of the pursuer's factor; which offering to prove by the communiers present, the Lords found, That a command, mandate or order is not relevant to be proved but *scripto vel juramento*. Fountainhall, 15th June 1688, Laigne *contra* Vauis. — In a process of ejection the defence being, That the defender entred into void possession with consent of the pursuer; this consent not being qualified by any palpable fact, was not found probable by witnesses. Stair, 12th December 1661, Gordon *contra* Abercromby. — Against a process of ejection it being alledged, That the pursuer removed willingly, and that the defender came into possession with his consent; It was answered, *Relevat scripto vel juramento*, but witnesses cannot be received to prove willingness of removing, being *mentis*. The alledgeance was sustained to be proved *prout de jure*. Stair, 26th July 1662, Robertson *contra* M'Intosh. — The pursuer of an ejection his voluntary removing and transporting all the goods to another place, altho' there preceeded no warning, was found relevant to be proved *prout de jure*. Durie, 26th November 1628, Bruce *contra* Bruce. Durie, 19th June 1637, Ruthven *contra* Gordon.

THIS defence against an heir's intromission, *viz.* That the father's relict had a liferent-tack of the lands, and by her tolerance he intromitted, was found relevant; and the Lords declared, That the tack being proved by writ, the tolerance might be proved by witnesses against this party. Durie, 8th July 1628, Dunbar *contra* Leslie. — In order to prevent the positive prescription founded upon by a churchman, it being alledged, That the possession was all along by a tolerance; the Lords found, That if the possession was alledged to have been 40 years as belonging to the kirk, the tolerance could only be proved by writ to elide the same; but if for fewer years, that it might be proved by witnesses. Stair, 22d June 1671, Duke of Buccleugh *contra* Parishioners of . — A precept of poinding being unwarrantably executed *extra territorium*, it was not found sufficient to infer a spuilzie against the employer, unless it were proved by the oaths of the messenger and defender's servants, employed by him to go along with the messenger as assistants, that they had express command so to do. Stair, 8th January 1663, Murray *contra* Hunter.

Verbal contracts.

A BARGAIN anent moveables found relevant to be proved by witnesses, tho' the price exceeded L. 100. Haddington, January 1609, Middlemeist *contra* Foord. Haddington, 23d November 1609, *contra* Bargain of moveables.

Alledgeances how relevant to be proved ?

contra Monro.—A bargain of victual sustained to be proved by witnesses against the seller's representatives, tho' nothing had been done in consequence of the bargain. Fountainhall, 13th January 1698, Hamilton *contra* Richard. --- In a process for restitution of cattle, delivered to be grazed, pursued after three years, the bargain and delivery found relevant to be proved *prout de jure*. Durie, Spotiswood, (*Probation*) 26th November 1628, Stirling *contra* M'Phadrick. --- A man having bound himself not to seek payment of the price of goods sold, if he sold any more of these goods to any other, within certain bounds, and having nevertheless sold; the Lords found the condition relevant to be proved *scripto*, and the selling *prout de jure*. Nicolson, (*Payment*) 17th December 1618, Wilkies *contra* Gordon.

Commodatum.

WITNESSES sustained to prove a *commodatum*, tho' the defunct had possessed the subject, lent eight or nine years, which his representatives pleaded did presume property, which was redargued by the pursuer's proving *quomodo desit possidere*. Stair, 27th January 1665, Scot *contra* Sir John Fletcher. Fountainhall, 28th July 1680, Wilson *contra* Tweedie and Towris.

Mutuum.

IN a process of proving the tenor of a bond for L. 100 Scots, the Lords refused to find the tenor proved, but they allowed the pursuer in the same process to insist for payment of the debt, and found the same relevant to be proved by witnesses, who saw the sum lent, and knew that the defunct paid annualrent for the same; which was found, because the bond exceeded not L. 100. Durie, 5th March 1628, Hammermen in Glasgow *contra* Crawford.

Accompt of furnishing.

THE Lords found, That an accompt consisting of divers articles, whereof none exceeded L. 100, altho' the total extended to a far greater sum, might be proved by witnesses. Auchinleck, (*Probation*) 16th January 1629, Allison *contra* Fullarton.—A taylor having libelled against a woman some suits of clothes, furnished and delivered to her by her own direction; the Lords found, That the furnishing and direction could only be proved by writ or oath of the defender, and not by witnesses, the sum being L. 400. Durie, 24th November 1632, Turner *contra* Ker. — This alledgeance, That the defender having heard a merchant-compt, under L. 100, read over to him, did acknowledge the whole to be right and true, was found relevant to be proved by witnesses, to exoner the pursuer from proving the delivery of the goods. Marcus (*Probation*) July 1687. *contra* .

Verbal submission and decret-arbitral.

DIFFERENCES about marches may be submitted and determined verbally, and both submission and sentence may be proved *prout de jure*. Gilmour, February 1662, Ld. Livingston *contra* Feuars of Falhouse. — A verbal submission and decret-arbitral, may be thus proved, by the party's oath, that he did submit, and by the arbiters, that they did determine. Stair, 7th February 1671, Home *contra* Scot. — The like, Gosford, 28th November 1672, Procurator-fiscal of Roxburghshire *contra* Ker. --- But where march-stones were set upon an alledged ver-

Alledgeances how relevant to be proved ?

verbal submission, it was sustained to be proved by witnesses, that the party was *de facto* present when the march-stones were set, in order to fix him. Gosford, *ibid.*

THE Lords found, That not so much as a tack for one year could be proved by witnesses, because it is a promise ; and where the contrary has been found, it was only in this sense, That the tack-duty might be proved by witnesses, when the tacksmen entered to possession. Fountainhall, 17th July 1678, Lord Pittligo *contra* Paton. Durie, 26th November 1628, Bruce *contra* Bruce. --- A promise not to remove, may be proved by witnesses, *ad hunc effectum*, to protect the defender in possession for a year ; but if it be insisted on for a further time, it must be proved *scripto aut juramento* of the pursuer, as also be proved, that it was accepted by the defender. Durie, 20th March 1629, Ld. Affleck *contra* Mathie. Erskine, 13th January 1592, Binning *contra* Douglafs. Colvil, 12th December 1581, Frazer *contra* Leslie. Colvil, May 1582, Earl Monteith *contra* Tenants. ----- But a command to do service after a warning, which implied passing from the warning, found not relevant to be proved by witnesses. Hope, (*Removing*) 11th December 1616, *contra* .--- In a removing the defender alledging, That the pursuer, after the warning, had promised to set the subject again for a year, if caution were found, which accordingly was offered, and the question being about the manner of probation ; the Lords found, That a single set for a year might be proved by witnesses, but this being conditional on finding caution, they admitted it only to be proved *scripto vel juramento* of the pursuer. Fountainhall, 20th January 1705, Jackson *contra* Graham. ----- The quantity of a house-mill alledged to extend to 400 merks yearly, can only be proved by writ (as former discharges, &c.) or oath of party. Spotiswood, (*Probation*) Durie, 16th January 1627, Dawlings *contra* Lord Balmerino. ----- Found, That the declaration of a patron's chamberlain was not probative of the yearly quantity of the stipend against his constituent, neither would the Lords allow it to be proved by witnesses, (such as the late and present incumbents) but only *scripto*, by the decreet of locality or discharges. Fountainhall, 2d July 1697, Couper *contra* Earl of Roxburgh.

A MAN having got a woman with child, did, at a communing with her friends, promise to pay a sum of money to one of them for her behoof, she being, on the other hand, to give him a declaration that he was under no promise of marriage ; the Lords found, That this was not a naked promise, but a mutual bargain, and therefore relevant to be proved by witnesses. Forbes, Fountainhall, 26th June 1706, Anderson *contra* Gordon. --- A vassal having incurred a legal irritancy, by allowing two years feu-duty to run on unpaid, a verbal bargain was entered into betwixt him and the superior, by which upon paying up the bygone feu-duties, and giving a piece of plate worth L. 20 sterling, the superior was to pass from his legal irritancy, and give a new charter ; the Lords found this could not be proved by witnesses, in respect the legal irritancy

Whether to be understood a mutual bargain or naked promise ?

Alledgeances how relevant to be proved ?

was always purgeable, and so the bargain seemed to resolve into a promise or complement of L. 20 sterling. Fountainhall, 27th November, Forbes, 24th December 1708, Fotheringham *contra* Hunter.

Laws, Customs, &c.

Municipal
custom.

IN a removing, a custom of the barony being alledged, That, after the decease of a tackfman, his children cannot be removed, they paying their grassum to the master each five years; the Lords found, That such customs cannot be proved by witnesses, unless in lands belonging to the kirk. Sinclair, 9th June, Balfour, (*Writ*) 9th July 1542, Finlason *contra* Ld. Keir. --- It being alledged to be the custom of a barony, that where a relict pays an herezeld, she bruiks the lands for payment of the old duty during her life; the exception sustained to her in a removing, to be proved by writ or oath, but not by similar instances. Durie, 25th July 1626, Ld. Rowallan *contra* Muir. --- A rental set by a burgh to a man and his heirs *ad perpetuam remanentiam*, which, by law, endures only for the setter's and receiver's lifetime *conjunctim*, was yet found to belong to the first heir of the rentaller, upon his proving, by sentences *in foro contradictorio*, or by oath of party, that such was the custom of the burgh. Spotiswood, (*Rental*) 22d, Durie, 26th June 1627, Earl Galloway *contra* Telziefer. --- The Lords had formerly been in use to allow such custom to be proved by witnesses. Spotiswood, (*Rental*) 21st January 1566, Lady Edmonstoun *contra* Edmondstoun. --- As a defence against a singular successor in a barony, it being alledged by a tenant, pursued for his rent, That it was the custom of the barony for tenants to pay half a year's rent at their entry, and so to be free of rent at the term they remove; the Lords allowed the custom of the barony to be proved by witnesses. Stair, 7th January 1662, Earl Lauderdale *contra* Tenants of Swinton. --- In a question touching the place within a regality, where poindings ought to be executed, there being two places that pretended to the privilege; the Lords found, That the place might be ascertained by witnesses, *viz.* messengers and witnesses present with them at executions, and that there was no necessity to prove by production of executions, because such writings use, generally, to be destroyed when the debt is paid. Durie, 3d June 1630, Chisholm *contra* Ld. Torsonce.

Foreign
laws.

FOREIGN laws and customs found relevant to be proved by witnesses. Nicolson, (*Intromission*) 1st July 1619, Dingwall *contra* Vendosm. --- A testimonial of justices of peace from England or Ireland, was found not sufficient to prove the custom there, of sustaining a writ, granted by one who cannot subscribe, if sealed and delivered by him; but the Lords found it needful to have the certificate of a supreme judge there, who, himself had power to judge of the validity of writs. Nicolson, (*Justice of Peace*) 25th November 1620, Paterson *contra* Hall. --- A bond granted beyond seas, and wanting witnesses, writer, &c. was sustained, the party proving, That in those places such bonds were valid; but this probation was not allowed by witnesses, but by testimonial of the judges of that country. Durie, 6th and 8th Decem-

Alledgeances how relevant to be proved ?

December 1626, Strangers of Middleburgh *contra* Executors of Smith.

Delicts how relevant to be proved ?

A BOND made by a woman that cannot write, and subscribed by two notaries and four witnesses, being assigned for an onerous cause, cannot be reduced upon fraud, to be proved by witnesses insert and the communers, but by the assignee's oath only. Gosford, 21st December 1671, Melrofs *contra* Douglafs. — In a declarator of expiration of the legal of an apprising; it was alledged for the defender, That the pursuer had intromitted with the mails and duties of the appraised lands, equivalent to the sum appraised for, while he had both an assignation to the apprising, and a wadset-right in his person, and suspecting his intromissions would be ascribed to the apprising, and not to the wadset, he, after expiring of the apprising, gave back the old assignation, and took a new right posterior to the intromission, and this was offered to be proved by famous witnesses: The Lords, in respect the alledgeance was fraud, allowed the witnesses to be examined *ex officio*, albeit the pursuer contended it was only relevant to be proved *scripto vel iuramento*. Marcus, (*Comprifings*) February 1683, Grant of Kirdels *contra* Grant. — A Cautoner for a foreign factor being sued for goods consigned in the factor's hand, proponed this defence, That the pursuer was *in mala fide* to deal with the factor, after he knew that he was broke; the Lords sustained this defence relevant to be proved by the writ or oath of the pursuer; but they refused to admit witnesses, not even those who were alledged to have intimated the bankruptcy to the pursuer, before he sent off the goods. Durie, 4th March 1630, Ritchie *contra* Paterfon.

Fraud.

A PARTY having denounced, in order to comprise, and the debtor suspending, and before the suspension was discussed, another creditor having comprised and been infest; the Lords sustained the objection of collusion relevant against the appriser infest, that he had procured the suspension by his own labour and expences; but this was sustain'd to be prov'd only by writ or oath of party. Durie, 28th November 1628, Borthwick *contra* Clerk. — Collusion being objected against a preferable creditor, in that he desired the baillie and clerk to keep his infestment secret, &c. the Lords refused to admit witnesses to prove the emission of words, but admitted them for proving the other circumstances of fact. Stair, 15th December 1671, Duff *contra* Forbes of Culloden.

Collusion.

USURY may be prov'd by any sort of witnesses, and the proof not restricted to instrumentary witnesses. Home, 7th January 1724, Mitchell *contra* Petrie.

Usury.

PERJURY of witnesses may be proved by witnesses. Balfour, (*Witness*) 6th April 1565, Ld. Rossie *contra* Lord Innermeith's witnesses.

Perjury.

Alledgements how relevant to be proved?

Falſe allegation.

A MINOR having granted bond of cautionry, and the charger offering to prove by the instrumentary witneſſes *omni exceptione majores*, that he affirmed himſelf to be major, and ſo could not be reſtored; this affirmation not found relevant to be proved by witneſſes, but only *ſcripto vel juramento* of the minor, becauſe the affirmation is a *nuda emiſſio verborum*, and no reaſon to truſt witneſſes poſſibly in great ſums, where the creditor has a remedy by inserting the affirmation in the bond. Durie, *ult.* February 1637, Weemyſ *contra* Creditors. Fountainhall, 5th January 1681, Borthwick *contra* Young.

Deforcement.

DEFORCEMENT not ſuſtained relevant to be proved by witneſſes, ſeeing there ought to have been an execution of deforcement by the meſſenger. Spotiſwood, (*Probation*) 6th March 1629, Duke of Lennox *contra* his Chamberlains.

Breach of duty.

THE alledgement, That a man was taken with caption, and diſmiſſed again, found relevant to be proved only by writ, or oath of party, and not by witneſſes. Spotiſwood, (*Caption*) 12th July 1626, Guthrie *contra* Ld. Barnbarroch. --- A meſſenger being purſued for the debt owing by a party whom he had taken, and, inſtead of priſon, put him in a private houſe, from whence he made his eſcape; the libel was found relevant, and that the employment and fact might be proved *prout de jure*. Durie, 13th February 1628, Kello *contra* Mac-kilon.

Other Alledgements how relevant to be proved?

That one exerced an office.

FOUND relevant to be proved by witneſſes, that ſuch a man was town-clerk, and in uſe to give ſafines. Hope, (*Precepts and instruments of ſafine*) 15th July 1615, Douglas *contra* Cheeſlie. Hope, *ibid.* 17th February 1619, Lord Huntly *contra* Lord Forbes. --- The legality of a notary, and that he was habite and reputed ſuch, was not found relevant to be proved by witneſſes, but by three unſuſpected instruments at leaſt. Haddington, 22d January 1593, Seaton *contra* Cant.

That instruments were taken.

AN application being made for letters to charge a notary to deliver up an instrument, alledged taken in his hands, and the notary reſuſing that any ſuch instrument was taken in his hands; the Lords allowed the fact to be proved by witneſſes. Balfour, (*Writ*) 5th December 1566, Stirling *contra* Monteith. --- But afterwards found, That no other proof is relevant but the notary's oath and his book; yet, if an instrument be taken in court, the Lords inclined to think it might be proved *per membra curiæ*. Haddington, 16th January 1611, *contra*

Time of preſenting a ſignature.

IN a competition betwixt an appriſer and a donatar of liferent-eſcheat, it was ſuſtain'd to be prov'd by the members and clerks of exchequer, That the appriſer preſented a ſignature before the liferent-eſcheat took

Single Witnefs in what Cafes fufained ?

took place by lapfe of year and day. Stair, 27th July 1673, Earl of Annandale *contra* Creditors of Sinclair.

IN curatory accompts, fome bonds of the minor's having lien over without diligence, till the debtors were become insolvent; it was found relevant to free the curator, if he could prove by witneffes, that he did fearch the charter cheft, but did not find the bonds in queftion. That the curator upon fearch could not find the bond.
Stair, 24th June 1680, Cleland *contra* Ld. Lamington.

Single Witnefs in what Cafes fufained ?

Cedent's Oath, if good againft the Affigney ?

OATH of the cedent good againft the affigney before intimation, in all cafes; for when the right is in his perfon, and before he is denuded by intimation, it is truly an oath of party, which muft be final with regard to all deriving right from him, as well as with regard to himfelf. Good before intimation as an oath of party.
Stair, 15th February 1662, Ld. Pitfodells *contra* Ld. Glenkindie.

OATH of the cedent to prove payment, not good againft the onerous affigney. Durie, 15th February 1627, Cunningham *contra* Rofs. ---- Not good againft an onerous affigney to annul his right.
A trustee in lands having fold the fame for a juft price, his oath acknowledging the truft found not probative againft the purchafer. Fountainhall, 14th November 1702, Anderfon *contra* Dempfter.

A SUBMISSION was found null, becaufe only fufcribed by one notary, it being about an heritable right; and when the truth was offered to the party's oath, the Lords refufed to take the oath of the cedent in prejudice of the affigney. Hope, (*Arbitration*) 7th January 1617 *contra* . ---- If relevant to fupply the defect of a writ founded on to vouch a defence.
The nullity of a difcharge, as being fufcribed but by one notary, found not fuppliable by the creditor's oath in prejudice of his onerous affigney. Haddington, 16th March 1622, Cuninghame *contra* Cuninghame.

A CEDENT'S oath is not good againft an onerous affigney, to prove payment, compensation, or any direct exception againft the debt; but where compensation was proved *feripto*, and the affigney reply'd upon recompensation, the cedent's oath was fufained to take off this recompensation, tho it landed in eliding the affigney's claim, by fupporting the compensation pleaded againft it. Stair, 7th November 1674, Boyd *contra* Story. — The like. Stair, 14th December 1675, Crawford *contra* M'Carter. Recompensation.

IN a queftion about a proof of cafes, tho' the cedent's oath who gave the cafe, is commonly fufained where the cafe is not fpecified; yet where the tranfmiffion bore the precise fum paid for the right, the cedent's oath was not fufained contrary to his own writ. Good to prove cafes.
15th February 1733, Campbell of Barwilline *contra* Relict of Mr. Alexander Campbell,

Single witness in what Cases sustained ?

That the
sum assigned
was a game
debt.

THE oath of the indorser sustained against the onerous indorsee, to prove that the bill was for money won at play, and consequently void. A cedent who has given warrandice that the whole debt is resting owing, is not allowed thereafter to depone against the assigney, that any part is paid : But in the present case there is the same reason for sustaining the cedent's oath, that there is for sustaining a proof of payment by the common debtor's oath against an arrester, because, being liable in warrandice, it is virtually deponing against himself. 9th February 1731, Pringle *contra* Campbell.

Good against
a gratuitous
assigney.

IN a question, whether the oath of the cedent can prove against a gratuitous assigney, the assigney's oath was ordained to be taken, before answer, whether the assignation was for a cause onerous or not. Stair, 16th June 1665, Wright *contra* Shiel. — A father having assigned a bond to his son *in familia*, who had no visible estate to acquire it, in this case the father's oath was found good against the son the assigney. Stair, 30th November 1665, White *contra* Brown. — A brother being assigned to a bond or decret for no onerous cause, and so a donation, the Lords sustained compensation to be proved by the cedent's oath, without necessity to reduce upon the act of parliament 1621. Gosford, 11th July 1671, Wardlaw *contra* Pittillo. — An assignation being granted in part gratuitous, in so far as gratuitous the cedent's oath was sustained against the assigney. Stair, 25th February 1679, Steel *contra* Ld. of Orbiston. — The like. Marcus, (*Compensation*) January 1684, Fotheringham *contra* Agnew.

Oath of the Debtor, if good against his Creditors ?

Common
debtor's oath
good against
the arrester.

IN a process of furthcoming, the Lords found payment relevant to be proved by the common debtor's oath in prejudice of the arrester. Forbes, 20th February 1711, Horn *contra* Lord Edward Murray. — The like. Fountainhall, 5th June 1711, Forbes *contra* Debtors of Forbes. — In a process of furthcoming, the pursuer produced a bond due by the arrestee to the common debtor ; the defence was, That it was granted, *spe numerandæ pecuniæ*, and no money ever advanced ; the Lords found, That this exception may be proved by the common debtor's oath against the arrester. Home, 23d November 1725, Sir William Nairne of Dunfinnan *contra* Drummond.

But not that
of the arrestee.

BUT in a competition betwixt an arrester and an assigney, the assigney craving preference, because his assignation, tho not intimated, was shown to the debtor before arrestment was laid in his hands, and who promised payment ; this was only found relevant to be proved by writ or the arrester's oath of knowledge ; for the arrestee's oath, who had no interest in the question, could be no better than that of any other indifferent witness. Stair, 11th December 1674, Elphinston *contra* Home. — For the same reason, in a special declarator of escheat, the rebel's oath was not sustained against the donatar, to prove that the bond pursued

Single Witnesses in what Cases sustained?

fued for was fatisfy'd and paid before denunciation. Stair, 10th February 1663, Montgomery *contra* Montgomery.

THE predecessor's debt being fixed against his heir, upon the *medium* of being held as confessed upon the passive titles, the debt was found unquarrelable by the heir's personal creditor, who had used inhibition, prior to his competitor's process, upon the passive titles. Fountainhall, Forbes, 12th July 1711, Nairne *contra* Beatson.

Debitor's acknowledgment as being held as confessed, good against an inhibitor.

A CAUTIONER in loosing of arrestment being pursued for payment of the debt after it was constituted against the principal debtor, the oath of the person in whose hands the arrestment had been laid was found a good proof of what he was owing to the common debtor the time of the arrestment, in order to make the defender liable for the same. Durie, 2d February 1627, Lord Balmerino *contra* Ld. Lochinvar. — A cautioner for an apprentice being charged for an alledged fornication committed by the apprentice, the oath of the apprentice was found not probative against him. Fountainhall, 17th December 1686, Mallerines *contra* Baillie. — A party having become cautioner for a maid-servant in a tavern to her mistress the vintner, to pay whatever balance should be due after compt and reckoning betwixt the mistress and him the cautioner; and the mistress having compted with the maid-servant only, the Lords, after the maid-servant's decease, found the cautioner liable for the said balance, and repelled the defence, That the creditor had not accompted with him the cautioner in terms of the bond. Home, March 1683, Cockburn *contra* Turnbull.

Oath of the principal debtor, if good against cautioners?

A BANKRUPT having sold some goods, in a competition betwixt a creditor, who arrested the price, and another party, who alledged, That the goods did belong to him, and were sold by the bankrupt as his factor, and for evidence produced proper documents under the bankrupt's hand; the Lords found, That the seller of the goods being bankrupt, his evidence could not be received to prefer one party to another; and therefore allowed the party who claimed the goods to prove his property *prout de jure*. Stair, 10th February 1680, Morton *contra* Gilchrist. — Found it not relevant for one to extinguish a debt due by him to his brother who was out of the kingdom, by holding the brother as confessed, to the prejudice of the brother's creditors; but it was found necessary that his oath should be reported, in regard this was *inter conjunctas*. Forbes's MS. 2d December 1713, Nairne *contra* Ogilvie. — In a process of furthcoming of a debt constituted by bond, it was objected by the arrestee, That the bond was granted by him *spe numerandæ pecuniæ*, which he offered to prove by the common debtor's oath; this was found not relevant, because the common debtor was bankrupt. Home, 23d November 1725, Nairne *contra* Drummond.

What if the debtor be bankrupt?

Single Witnesses in what Cases sustained?

Administrator's Oath if relevant against his Constituent?

Tutor and
curator's oath,
if good against
the minor?

A MINOR and his curators having charged upon a bond, this reason of suspension, That at taking the same they had agreed to discharge part of it, as being sensible it was not justly due, found relevant to be proved by the oath of the minor, but not of his curators. Durie, Auchinleck, (*Minor*) 1st July 1628, Forbes of Gask *contra* Ld. Pitfligo. ---- Tho' the tutor's oath of knowledge of any debt due by his pupil's predecessor will not prove against the pupil, because there he depones *tanquam quilibet*; yet his oath, as to deeds of administration done by himself, will prove against the pupil. Stair, 12th December 1661, Hepburn *contra* Hamilton of Orbeston. — A Bond granted payable to two co-tutors for the use and behoof of their pupils, being assigned to the pupils after their majority; the Lords found, That the debtor could not prove payment by the oath of the surviving tutor, the other being dead, and both *officio functi*, altho' it was alledged, that the payment was made to the tutors themselves, and their oath ought to be good *in proprio facto*. Forbes, 16th July 1707, Waddels *contra* Wadderston.

Executor's
oath will not
prejudge those
who have in-
terest in the
executry.

FOUND, That the oath of executors, that a debt was paid to the defunct, will not prejudge the defunct's children or creditors. Nicolson, (*Executor*) 23d November 1619, Bell *contra* Gib. ---- When a creditor pursues for payment against an executor, he must prove his libel otherwise than by the executor's oath, because the executor will get no exoneration upon account of any debt confessed owing by his own oath. Spotiswood, (*Executor*) 19th June 1624, Monteith *contra* Smith. Durie, 6th March 1627, Scot *contra* Cockburn. ---- An executrix being pursued for payment of a debt, the verity whereof was referred to her oath; the Lords found, That she ought to give her oath, but that the sentence to follow thereupon should only prejudge herself, in so far as she had benefit as relict, legatrix or executrix to the defunct, but that the same should not be prejudicial to the defunct's other creditors or legatars; and therefore they ordained the pursuer to find sufficient caution to repay the sum he should recover, in case the executrix should be distressed by the other creditors or legatars, by the testament's being exhausted. Durie, 13th March 1627, Ker *contra* Lady Covington.

Oath of ma-
gistrates, if
good against
the town?

THE tacksmen of a town's mills charged for his tack-duty, offered this reason of suspension, That the magistrates in office who set the tack, promised to obtain a decreet of thirlage against the feuars, which was never done; this was found relevant to be proved by the oaths of these magistrates, tho' now *functi officio*. Gosford, 13th January 1676, Johnston *contra* Deaf of Guild of Aberdeen.

Oath of the
mandatar, or
*negotiorum ge-
stor*, if good
against the
mandant?

FURNISHING of ale, &c. to one who kept a tavern, and prices thereof, found relevant to be proved by his wife's oath as *præposita*. Durie, 6th March 1630, Barclay *contra* Binnie. ---- A woman is understood to be *præposita negotiis domesticis*, so that for the provision of her

Single Witness in what Cases sustained?

her house she may take from the flesher and bakers, and others, such furnishing as is necessary, and her declaration may be taken, and ought to be trusted as to the same. Dirleton, 7th December 1675, Dalling *contra* Mackenzie. — Merchant accompts subscribed by the wife, is a sufficient proof against her husband. Gosford, 25th July 1676, Campbell *contra* Ld. of Abden. — The like. Haddington, 6th March 1611, Arnot *contra* Countess of Orkney. — A party being pursued for an accompt of merchant-ware taken off by himself, his Lady and children, the oaths of the Lady and children were found relevant to prove such of the articles as were taken off by them. Fountainhall, 24th January 1685, Lauder *contra* Chalmers. — Furnishing to a minor in *familia paterna* of clothes and other necessities, was found not to fall by the triennial prescription, the accompt being duly attested by the minor within the three years. Fountainhall, 14th January 1698, Hopekirk *contra* Daes. — An accompt of horse furniture and saddle-work furnished to a Nobleman, tho' subscribed by his master of horses, *præpositus tali negotio*, within the three years, was yet found to fall by the triennial prescription. February 1724, Guthrie *contra* Marquis of Annandale.

AN alledgeance, That the wife had corrupted and bribed the witnesses led in a process between her husband and a third party, was not found relevant to be proved by her oath against her husband. Durie, 7th July 1632, Ld. Renton *contra* Ld. Wedderburn.

A GIFT of marriage for the behoof of the vassal himself being discerned to be communicated to the subvassal, upon his paying a proportion of the composition, and of the expences laid out in procuring the same; the Lords found the composition and expences relevant to be proved by the pursuer's oath, without necessity of any other instruction. Marcus, (*Ward and Marriage*) January 1686, Major Buntein and Drummelzier *contra* Murray of Stenhope. — The like. Marcus, (*Warrandice*) March 1684, Bruce *contra* Fraser of Techmurie.

Creditor's Oath if sustain'd against third Parties having Interest?

EXECUTORS having paid a debt resting by the defunct, and having ignorantly destroyed the document, yet the payment was sustained to them, the creditor making oath, that it was a true debt resting by the defunct, and that he was paid thereof by the executors. Auchinleck, (*Executor*) 24th July 1628, Executors of Edgar *contra* Edgar. — In the same cause, servants and factors fees being so paid, were also allowed, they giving oath that the same were paid by the executors. *Ibid.* — An executrix having paid an heretable bond due by the defunct, and cancelled the same, without taking a discharge; in a process of relief against the heir, it was objected, That the bond might have been paid by the defunct, and taken out from among his writs by the executrix; the Lords found, That the payment alledged made by the relict after her husband's decease, might be proved by the creditor's

Single Witnesses in what Cases sustained?

debtor's oath, and that the bond was a subsisting obligation uncanceled at that time. Durie, 7th March 1629, Falconer *contra* Blair.

A THIRD party founding upon a clause in a writ conceived in his favours, it was alledged against him, That the writ was never a delivered evident, which was offered to be proved by the creditor's oath. This was repelled; for since the writ was out of the debtor's hands, it was found, That the benefit of the clause could only be taken away by his oath in whose favours it was conceived. Stair, 8th June 1676, Irvine *contra* Forbes. — Two sisters having right to a bond, as representing their father, the executions of an inhibition served thereupon were challenged in an imprecation as false, and the pursuer succumbing in his probation, did afterwards insist that his witnesses were bribed and corrupted by the two sisters; this alledgeance was not found relevant to be proved by the oath of the one sister against the other sister's husband. Durie, 7th July 1632, Ld. Renton *contra* Ld. Wedderburn.

Wife's Oath with regard to Transactions before Marriage, if relevant against the Husband?

Promise. A PROMISE made by a woman while single, cannot be proved by her oath against her after-husband. Hope, (*Husband*) Heriot *contra* Watson, and other cases there cited.

Held as confessed. As a husband cannot be prejudged by his wife's oath, so neither by her being held as confessed. Marcus, (*Oaths*) July 1688, Urquhart *contra* Nairne.

Oath of calumny. A WIFE's oath of calumny cannot militate against her husband. Stair, 11th January 1676, Paton *contra* Pitcairn.

Intromission. A WOMAN's intromission with her first husband's effects, found not relevant to be proved against the second husband by her oath. Auchinleck, (*Wife*) 9th December 1630, Stirling *contra* . — A woman who was tutrix to her son having married a second husband, whom the minor chose to be his curator, in an *actio tutelæ* against the mother and her second husband, where her intromissions were referred to her oath, it was objected, Not a relevant proof against the husband. Answered, It being known to the husband that his wife was left tutrix, and that she administered accordingly, the pursuer cannot be prejudged by the marriage, being *ante rationes redditas*. The Lords did find the charge was relevant to be proved by the wife's oath to bind the husband, he himself having been curator, and knowing that she was tutrix, and so constituted debtor to compt. Gosford, 11th February 1676, Marshal *contra* Baffily. — A pursuer having referred the verity of a debt to a married woman's oath, and to the husband's oath, his knowledge before the marriage that she had promised payment, the Lords found the proof relevant. Haddington, 13th February 1606, Weemy's *contra* Christie.

THE

Publick Instrument how far probative?

THE Lords ordained a wife to give her oath upon the verity of her subscription of an obligation granted while she was *soluta*, and declared the same should be good against her husband. Auchinleck, (*Wife*) 19th January 1630, Brenton *contra* Maxwell. — A holograph bond granted by a woman *soluta*, was refused to be registred against her husband; tho', to take off any suspicion of antedating, the creditor offered to prove the furnishing made to her, which was the cause of the bond, and also to produce many famous witnesses who saw the bond before the marriage, and in fortification of all, to prove by the wife's oath that it was a just debt; which appears strange. Durie, 20th January 1636, Temple *contra* Lady Whittingham. — A man and his wife being pursued upon a note granted by her before their marriage, which was subscribed by initials only, the writer not designed, and but one witness, a woman, and the verity of the subscription being referred to her oath, which was alledged to be relevant, being only to adminiculate a defective writ; the Lords sustained the wife's oath to subject the husband. Marcus, (*Stante matrimonio*) 2d February 1688, Wilson *contra* Robertson.

If relevant to support a defective document of debt by the wife's oath?

IN an exhibition *ad deliberandum* against a wife of writs belonging to her *proprio jure*, she was ordained to exhibit upon oath, tho' her husband had an interest therein *jure mariti*. Stair, 27th January 1680, Cuninghame *contra* Lord Cardross. Spotiswood, (*Exhibition*) 26th February 1633, Swinton *contra* Ld. West-Nisbet.

In an exhibition of writs.

FOUND, That in all cases, where a wife's oath is craved upon a debt contracted in her widowhood, she ought to give her oath, but that the husband cannot thereby be prejudged, nor she herself personally during the marriage, only that it should operate against her or her representatives after dissolution of the marriage, or to affect any subject reserved from the *jus mariti* even during the marriage. Durie, 9th March 1627, Ker *contra* Ld. of Covington. Durie, 20th January 1636, Temple *contra* Lady Whittingham. Stair, 26th February 1668, Graham *contra* Towns.

Wife's oath, how far good against herself?

Publick Instrument how far probative?

Messenger's Execution.

THE Lords refused to allow a debtor to prove that there were moveables on the ground sufficient to pay the debt comprised for; but found there was *præsumptio juris & de jure* for the messenger's execution. Haddington, July 1611, Ld. Philorth *contra* Lord Pitligo. — The Lords sustained process of spuilzie of labouring goods, the pursuer positively proving that there were more goods poindable upon the ground, and in the poinder's view the time of the poinding, than would have satisfy'd the debt; and had no respect to the messenger's execution declaring the contrary, he being one of the parties.

Where it makes a legal proof.

Publick Instrument how far probative?

ties principally conven'd in the spuilzie. Newbyth, 19th December 1666, Lundie *contra* Auchinleck.

Where it
makes no e-
vidence.

IN an action against a magistrate for not taking a rebel, after he was charged for that effect; the Lords found, That the summons bearing the rebel to have been in the magistrate's company the time of the charge, behoved to be otherwise proved than by the messenger's execution, which was found not probative. Durie, 29th June 1626, Halyburton *contra* provost of Jedburgh. — In a pursuit against a sheriff for disobeying a charge to take a rebel, and the messenger's execution being produced *per modum probationis*, bearing, that the rebel was sitting by the sheriff when the charge was given, and was pointed out to him by the messenger, which was offered to be adimiculated by the instrumentary witnesses; the Lords, notwithstanding, preferred the defender, offering to prove by most famous witnesses, that the rebel was gone before the charge was given, unless the pursuer would condescend upon as famous witnesses, the instrumentary witnesses being the pursuer's near relations: For they respected not the execution, which bore, that the messenger pointed out the rebel, as being no part of his duty, which was only to give a charge, and not to insert an extraneous narrative. But if the question had been, Whether a charge was *de facto* given or not, no witnesses would have been receivable, but the instrumentary witnesses only. Spotiswood, (*Capti-on*) 18th January 1631, Home *contra* Ld. Renton. — In a subsidiary action against a magistrate for suffering a prisoner to escape, the messenger's execution was found not, *per se*, probative, that the rebel was warded by command of the defender, but the instrumentary witnesses, or other habile witnesses were allowed to be adduced. Durie, 24th January 1642, Smith *contra* Williamson.

Virtual exe-
cution.

FOUND a note of a messenger pointing some oxen, not sufficient to instruct that the creditor pointed them, because it was not by way of instrument, nor were the letters of pointing produced. Fountainhall, 24th March 1685, Glendinning *contra* Glendinning.

Notaries Instrument.

Where it
makes a legal
proof.

IT being offered to be proved against an instrument of requisition, by the procurator and witnesses, that only the part of a sum was required and not the whole; the Lords repelled this, unless the proposer would consign L. 40 Scots, and offer to improve it; because, tho' the common instruments of notaries be not probative till the witnesses insert be examined, yet instruments of premonition, requisition, sasine and resignation are probative of themselves, because they depend on procuratories and precepts, and are the foundations and parts of securities of estates. Fountainhall, 30th June 1680, Ruthven *contra* Earl Callendar. — A reverser having made offer of a bond to the wadsetter, and caution to pay him his annualrents on his ceding possession, in terms of the act 62, parl. 1661, and taking instrument thereupon, the instrument, tho' but

Publick Instrument how far probative ?

but the assertion of a notary, was found to be probative of the offer; tho' the bond itself was not produced. Forbes, 21st, Fountainhall, 26th, December 1710, Earl Leven *contra* Morison.

THE offer of a disposition in consequence of an exceptionable decret, pleaded upon as an homologation of the decret, was not found proved by an instrument taken in the hands of a notary upon the offer; but it was found necessary that the same should be adminiculated by the oaths of the instrumentary witnesses. Stair, 4th February 1671, Lowrie *contra* Gibson. — An apprentice having eloped, the offering him back by his cautioner under form of instrument, was not found proved by the instrument itself, but the witnesses and notary were examined thereupon. Fountainhall, 17th December 1686, Mallenig *contra* Baillie. — An assigney becoming bound to deliver up the bond to the cedent when required, otherwise to be accomptable for the debt, and being required under form of instrument to deliver the bond, but nothing having followed upon the requisition for near the space of 40 years, till the notary and instrumentary witnesses were dead; in a process for payment against the assigney, founded upon the said instrument of requisition, the Lords refused to sustain the instrument probative, unless it were adminiculated by some document or other probation. Bruce, 29th June 1715, Glas *contra* Stewarts.

AN instrument of consignation subscribed by the notary, does not prove against the consignitar so as to burthen him with the money, unless the consignitar also sign it, nor were the witnesses insert in the instrument allowed to prove it, tho' the sum was only L. 100 Scots. Durie, Spotiswood, (*Redemption*) 14th January 1630, Lowrie *contra* Miller. — The Lords refused to sustain process upon an instrument subscribed by two notaries, bearing, that a party confest that he sold and disposed to another his tack of certain lands. Hope, (*Notary-publick*) 1st December 1611, Anstruther *contra* Thomson. — An instrument of a notary-publick, bearing spuilzied goods to have been lawfully restored, and in as good condition as when they were away taken, was found no sufficient probation of the avail of the said goods, nor that they were as good the time of restitution, as when they were spuilzied, *quia notarius non potest testificari, nisi de his quæ sensu percipit corporeo; at valor rei intellectus judicio percipitur*. Balfour, (*Writs*) 24th March 1541, Miller *contra* Ld. Cullerny. — A certificate signed by a minister, bearing, That the testator left a particular legacy, above L. 100 Scots, to a person named in the certificate, found a sufficient evidence of the legacy, tho' not signed by the testator, nor by the minister in his name, but only as a certificate of a fact, drawn out in the shape of a notorial instrument; and this notwithstanding the testator had formerly made his testament, without mention of any such legacy. Durie, 31st January 1639, Dundas *contra* his grandfather's executors.

Publick Instrument how far probative?

Instrument of Sasine.

Sasine upon
a precept or
propriis mani-
bus, will bear
no faith with-
out its war-
rant.

A SASINE, tho' it be a legal proof of the fact, that possession was apprehended, where it proceeds upon a warrant, yet it is no presumptive proof of the warrant, and therefore can avail nothing unless the warrant be produced. Stair, 20th December 1664, Norvel *contra* Hunter. — A sasine bearing to be *propriis manibus*, not being sign'd by the alledged granter, nor adminiculated by any writ under his hand, was found no sufficient title to quarrel a competing right. Falconer, 15th November 1682, King *contra* Chalmers. — A naked sasine of a mill not sufficient in an action for abstracted multures. Spotiswood, (*Mills and Multures*) 19th March 1628, Adamson *contra* Tenants. — In a process of nonentry, a sasine alone without the precept was found not sufficient to prove the lands full, tho' both the brieve and retour were produced; but there was no vestige of the precept in the chancery. Colvil, May 1583, Ker *contra* Ker.

When a sa-
sine bears to
be upon a pre-
cept, what held
a sufficient
warrant?

IN a pointing of the ground upon an infeftment of annualrent, there being nothing produced but the pursuer's sasine thereof, bearing, "That it proceeded upon a precept of *clare constat*, granted to him as heir to his father, by the defender's mother, as commissioner for receiving vassals in his name;" and the precept insert in the sasine; the Lords found the sasine not sufficient, unless the precept of *clare constat* and the mother's warrant were also produced. Durie, 15th November 1626, Wylie *contra* Ballenden. — The Lords refused to sustain process, tho' only against a tenant in a removing, upon a sasine, the warrant whereof was a precept of *clare constat*, expressed in the sasine granted by the superior's brother as his commissioner, until the precept and commission, whereto the sasine referred were produced. Durie, 25th January 1632, Hamilton *contra* Dundonald. — Yet a process of removing was sustained upon production of a simple sasine, and that even at the instance of a compriiser. Spotiswood, (*Removing*) 21 June 1627, Bad *contra* Ord.

To support
a sasine *propri-*
is manibus,
what held a
sufficient war-
rant?

A SASINE bearing to be given by the superior *propriis manibus*, was sustained, the procuratory of resignation produced being found a sufficient adminicle to support the notary's assertion. Stair, 17th January 1672, Young *contra* Thomson. — A sasine given by a father to his son *propriis manibus*, sustained, it being registred *debito tempore*, and adminiculated by a personal bond granted by the father, obliging himself to warrant the infeftment, and to grant charters and precepts. Stair, Gosford, 11th February 1669, Buchan *contra* Taits. Found, That a sasine given by a man to his son *propriis manibus*, prior to another sasine, proceeding on a charter, was preferable, because of a preceeding contract of marriage, altho' there was no relation thereto made in the sasine. Hope, (*Sasine*) 23d January 1618, Murray *contra* Schaw.

A SASINE of five acres of land given by a husband *propriis manibus* to his wife, was sustained upon this adminicle, That by contract of marriage he was obliged to infeft her in five acres of lands, tho' the land in the sasine was not the same, in respect she had no other infeftment

Publick Instrument how far probative?

ment given her. Hope, (*Safine*) ult. November 1615, Gray *contra* Finlason. — A contract of marriage was found a sufficient warrant to support a wife's *safine*, even in competition with a compriser. Stair, 29th June 1665, Norvel *contra* Hunter. — A *safine* given *propriis manibus*, bearing to be *intuitu matrimonii*, and marriage having followed, was sustained in a competition with an apprifer, the widow being in possession by uplifting mails and duties, altho' the *safine* had no adminicle. Durie, Spotiswood, (*Removing*) 22d November 1628, Clapperton *contra* Home — The contrary seems to be found. Hope, (*Safine*) Bell *contra* Morison. — An instrument of *safine* given to a wife *propriis manibus*, tho' but the assertion of a notary, was sustained, the wife not being otherwise provided, and having, besides, renounced a jointure she had with a former husband, in favours of the granter of the *safine*, which made a strong presumption that she was to have something in lieu thereof. Stair, 19th June 1668, Relict of Galrigs *contra* Galrigs. — A *safine* by a husband to his wife *propriis manibus*, bearing to be in implement of the contract of marriage, was sustained as a title for mails and duties, in competition with a creditor publickly infest, she producing the contract *cum processu*, but in the mean time the cause to go on. Durie, 27th January 1632, Lady Montquhanie *contra* Commissar of St. Andrews. — A *safine* being granted to a wife *propriis manibus*, for mere love and favour, yet the Lords would not sustain a reduction of the same, unless the pursuer would prove, that the relict was otherwise sufficiently provided in a jointure. Durie, 15th March 1639, Hamilton *contra* Relict of Hamilton.

THE bailies of a royal burgh are the King's bailies, and entitled to give infestment to the heirs of vassals holding burgage, just as any ordinary superior infests the heir of his defunct vassal, by the means of a precept of *clare constat*, with this difference only, that the bailies do not grant a precept in writ, the instrument of *safine* under the hand of the town-clerk, by inveterate custom, being not only a legal proof that possession was apprehended, but also that the bailie gave warrant or authority to that effect; but it has been much controverted, whether a *safine* within burgh by hasp and staple, as commonly called, be equivalent to a retour to give the heir an active title, not only with regard to the burgage lands wherein he is infest, but with regard to all other subjects whatever. The reason of the doubt was, that a *safine* by hasp and staple, can have no stronger effect than a *safine* upon a precept of *clare constat*, both of them do complete the heir's title with regard to the subject wherein he is infest; but as a precept of *clare constat* has no separate effect, as it makes no proof of propinquity with regard to any other subject, neither ought an infestment by hasp and staple. See Durie, 25th November 1623, Earl of Melrofs *contra* Ld of Basf. — A *safine* of burgage lands given to a man, as heir to his father, by the bailies of the burgh, was found sufficient to instruct him heir with regard to a process of warrandice pursued by him against his father's author in the lands, tho' he was not served and retoured, because the *safine* established his title to the property of the lands, and,

Safine within burgh by hasp and staple in favours of heirs, how far sustained as an active title,

Publick Instrument how far probative ?

qua proprietar, he was entitled to carry on this action of warrandice. Durie, Auchinleck, (*Safine*) *penult.* July 1629, Wilfon *contra* Stewart. --- The like, where the process pursued by the heir was a reduction of a disposition of the subject granted by his predecessor; and it was observed, That an infestment upon a precept of *clare constat* would be a good title for such an action. Durie, 9th July 1630, Houston *contra* Maxwell. --- The like. Forbes, 1st July 1714, Walker *contra* Creditors of Adamson. --- A *safine* by hasp and staple granted to an heir of the creditor in an infestment of annualrent, found a sufficient title to insist for a pointing of the ground, without production of the original infestment, tho' the creditor had been 38 years out of the possession of uplifting his annualrents. Such trust, it would seem is reposed in bailies, that the law presumes they will not give *safine* to an heir without being satisfied of his predecessor's title; so that the simple *safine* in all cases will be held as a sufficient title, unless the original right be challenged by a reduction and improbation. Durie, 17th March 1629, Yeoman *contra* Stewart.

How far
probative to
infer a passive
title ?

A *SASINE* by hasp and staple is a sufficient proof against an heir, of his entry, to subject him *passive* to all his father's debts; and this was found, tho' the *safine* was by the bailies of Kirkaldy, which, tho' it has the privileges of a royal burgh, yet holds not of the King in burghage, but of the Prince as Lord of Dumfermline, and therefore the bailies are not entitled to give *safines* to heirs, which was not respected, in regard the *safine* was the defender's own deed, whereupon he had taken instruments, and so was barred *personali objectione* from quarrelling the same. Durie, 13th November 1623, Marshall *contra* Marshall. --- But a sentence and ward of court of a royal burgh, whereby a man was recognised by testimony of witnesses to be eldest son and heir to the defunct, upon which his procurator took instruments, was found not to prove him to be heir, unless *safine* had followed upon the said act. Durie, Spotiswood, (*Heir*) 22d November 1628, Goodlet *contra* Adamson.

Safine in fa-
vours of a sin-
gular successor
how far proba-
tive ?

A *SASINE* granted by the bailies of a burgh to a singular successor, bearing to be upon a resignation, was found not sufficient to defend against a reduction and improbation pursued by the disponent's heir, without producing the disposition; for tho' such a *safine* may be a presumptive proof of property, and a good title to carry on every action relative to the subject, without necessity of producing the disposition; yet if the disposition be challenged as false or forged, it must be produced. Stair, 21st June 1672, Mitchel *contra* Cowie. --- The like. Stair, 11th February 1681, Irvine *contra* Corsen. --- A husband having granted to his wife a *lifereit-disposition* of a tenement within burgh, upon which *safine* was taken, bearing, that the husband had resigned *propriis manibus*, and the *safine* was subscribed by the bailie and notary, but not by the husband; in a competition, it was objected against this infestment, that it was null, as proceeding without any warrant from the husband. Answered, The *safine* bears that resignation was made, and being subscribed by the bailie as well as the notary,

Publick Instrument how far probative ?

ry, it is an instrument that in burgage-holding is probative of the resignation as well as of the infeftment, supported as it is by the liferent-disposition produced; the Lords sustained the instrument of sasine, in regard the liferent-right was produced, and that in the instrument of sasine the husband resign'd *propriis manibus*, in the hands of the bailie, who sign'd the said instrument with the notary, in terms of the act 27, parl. 1567. 25th June 1731, Sir Roderick M'Kenzie of Scatwell *contra* Christian Monro.

A SASINE of a house in the town of Hawick, found a good active title in a process, tho granted only by the bailie of the burgh, notwithstanding it is only a burgh of barony, and that it is the peculiar privilege (as was pleaded) of royal burghs, holding burgage, to have sasine granted by their bailies: But here it is observed that the superior concurred with the pursuer; but if he had granted a precept of *clare constat*, it would have been a more unexceptionable concurrence. Durie, 16th July 1629, Scot *contra* Deans.

Sasine granted by a bailie of barony.

Decrets, Acts of Court, &c.

A Decree being quarrelled for want of proof, bearing a judicial confession, not subscribed by the party, the Lords sustained the decree on this probation, the decree not being for a debt, but having proceeded upon a complaint against the party for abusing the provost, own'd by the defender in face of court, as the decree bore. Marcus, (*Probation*) 27th January 1682, Provost of Forfar *contra* Cuthbert.---- A decree before an inferiour court, bearing the defender's confession of his fault, not subscribed by him, not probative. Fountainhall, 20th November 1679, Mackie *contra* Miln.---- In support of a bond, craved to be reduced upon the head of force and fear, it being qualified, that the debtor had compared before the town council of Linlithgow, confessed his wronging of the said town in their traffick, and therefore was willing, as reparation, to grant the bond in question, all which did appear by an act of the town council produced; this act of council was found to be no proof, being only under the town clerk's hand, not subscribed by the party. Stair, 13th February 1663, Town of Linlithgow *contra* Unfreemen of Borrowstounness.---- A decree of an inferiour court, upon a pursuit for a civil debt, bearing simply, That the defender confessed the libel, was found to be no proof against him, since it was only under the hand of the clerk, without the defender's subscription or oath. Stair, 19th July 1665, Gum *contra* M'Ewen.---- The like. Haddington, 13th February 1622, Orr *contra* Waddel.---- A decree of an inferiour court was reduced for want of proof, bearing the defender's acknowledgement upon oath, and the oath ingrossed, but not bearing that the oath was subscribed by the party, as, *de facto*, he did not subscribe the same, tho' he could write, and he alledged that the deposition, as contained in the decree, was disconform to what he had sworn. Stair, 21st November 1672, Carin *contra* Wilson.

Decree of an inferiour court, bearing the party's judicial confession, how far probative?

Publick Instrument how far probative ?

Decreet of
whatever
court, bearing
the parties
consent, not
probative.

A DECREET of session, bearing to proceed upon consent of parties judicially interposed, was found null, in regard it did not bear that the parties had subscribed their consent. Gosford, 8th February 1671, Laurie *contra* Gibson. — The Lords found in general, That a clerk of an inferiour court's assertions of an alledged consent, by a party or his procurator, extraneous to the ordinary steps of process, was not probative, and that the act 3, parl. 1686, ordaining interlocutors to be subscribed by the judges, did not alter the case. Yet *in actibus officii & processus credendum est clerico*; as if a party or his procurator declare he passes from such a conclusion of his libel, or restricts the same *pro loco & tempore*, such steps need not be subscribed by the party or his procurator. Fountainhall, 1st December 1693, Brown *contra* Henderson. — Consent in judgment verified by act of the presbytery, subscribed by the whole presbytery, found not valid, unless signed by the consenter. Gilmour, July 1661, Ker *contra* Steedman. — A minute in a process before the English judges, subscribed by the judge, importing the consent of one of the parties, was not sustained as relevant to be proved, being made up half a year thereafter upon memory only. Stair, 24th July 1661, Ld. of Buchanan *contra* Osburn.

Act of cura-
tory.

A CONFIRMED testament, bearing, That Hunthill compeared and made faith, and accepted the office of tutory, was found not sufficient of itself, without further adminicles to instruct that Hunthill accepted the office, seeing acts of inferiour courts prove not without a warrant, except in points of process. Stair, 31st January 1665, Kirktons *contra* the Ld. of Hunthill. — A sheriff-clerk's assertion, that a party accepted the office of curatory, found not sufficient, without the parties signing the act of curatory. Marcus, (*Tutors and Curators*) December 1686. Home, February 1687, Hamilton *contra* Porterfield of Hapland.

Judicial ra-
tification.

A JUDICIAL ratification upon oath not to come in the contrary, made by a wife *stante matrimonio*, tho' entred in the books of a sheriff-court and signed by the clerk, is void, if not signed by the wife herself. Durie, 30th January 1635, Mitchelson *contra* Moubray. — A disposition of lands, bearing the wife's consent as liferentrix, and subscribed by her, but without witnesses, being quarrelled by her after her husband's decease, an act subscribed by the sheriff-clerk only, bearing, " That she compeared judicially before the sheriff, and subscribed " the disposition outwith the presence of her husband, and made faith, " That she consented thereto voluntarily, and ratified the same; " which was pleaded as equivalent to her subscribing before witnesses; was not found probative, not being subscribed by the party. Durie, 22d January 1635, Bell *contra* Ld. of Mow. — It being objected against an act of court, bearing a wife's judicial ratification, that it was not subscribed by her the party; answered, By act 83, parl. 1481, the act of court subscribed by the proper officer is a legal proof of the fact. Answered, The intention of that act is not to fix what shall be understood a legal proof of a wife's judicial ratification, but that a judicial ratification shall be effectual in law to bar any challenge upon the head

Publick Instrument how far probative ?

head of force or fear. The Lords sustained the objection, and found the act not probative. Fountainhall, 15th February 1678, Glendinning *contra* Maxwell.

A SHERIFF having caused a person enact himself with a cautioner to compear before the justices, and underly the law for murder, under a penalty; this was not found probative, not being subscribed by the party. Durie, 26th March 1628, Lord Lovat *contra* Sheriff of Nairn. — An act of a baron-court, bearing, That the party had enacted himself cautioner to present a defender in a process, was found not probative, not being subscribed by the party, tho' subscribed by the judge and clerk, and a decret founded upon the act was found null. Stair, 3d February 1674, Ld. Strowan *contra* Cameron. Judicial enactment.

THE magistrates and council of a burgh having owned themselves debtors to a party by an act of council, signed only by the town-clerk, and not by any of themselves, the act was found sufficient, tho' not subscribed by the obligants, seeing it was a judicial act registred in their court-books, and that the pursuer offered to prove that they were in use to enact themselves after this manner, and to grant obligations by acts subscribed only by the clerk, and to pay such debts. Durie, 23d December 1626, Relict of Peebles *contra* Town of Perth. — Some parties pursuing the magistrates of a royal burgh upon the act 25, parl. 1695, for repayment of fines they had been decerned for in the late times for church irregularities, the Lords refused to sustain the clerk's assertion in the decret, That their fines were converted to the town's use, to be probative *per se*, this not being *actus officii* wherein the clerks are to be credited, else they might bind great debts upon corporations. Fountainhall, 25th June 1697, Eliot *contra* Magistrates of Edinburgh. — An act of council, bearing acknowledgment of a debt due to their provost, found no sufficient constitution of the debt, in respect it bore to proceed upon the report of a committee; and there was no evidence upon record that the committee did make the report, and the act appointing the committee, an extract of which was also produced, being null, as not signed by the *præses* of the meeting. Dalrymple, 26th November 1714, King *contra* Magistrates of Elgin. Act of council.

A REPORT of a commission for examining witnesses being craved to be reduced, for this reason, That the depositions were subscribed by the judge only, not by the witnesses; nor did the report bear that they could not write; yet the Lords adhered to the said report, and refused to loose the depositions after so long a time, the mean of probation being now perished. Fountainhall, 9th December 1684, Falconer *contra* Kinnier. — Depositions being subscribed only by the witnesses, not by the inferior judge who examined them; the Lords refused a bill of suspension presented upon that reason, but ordered the inferior judge to be more observant of form in time coming. Fountainhall, 22d December 1708, Dalrymple *contra* Wright. Depositions of witnesses.

Private Deed how far probative ?

Extract.

Of an inhibition. AN extract of an inhibition out of the record, sufficient to found a reduction *ex capite inhibitionis*, reserving to the defender to pursue improbation as accords. Home, January 1682, Williamson *contra* Threapland.

Extract from the register of reversions. AN extract out of the register of reversions found a sufficient title *ad inchoandam litem*, tho' the party who registers there gets back the principal evident; because the act 16, parl. 1617, declares an extract from this register to make faith in all cases, except in an improbation. Fountainhall, 21st February 1693, Wallace *contra* Earl Dundonald.

Of a comprising. THE extract of a comprising given by the clerk thereto, was found a sufficient active title, as being an authentick writ, tho' it was pleaded, That the comprising being only a *legal*, not a *judicial* deed, and the clerk chosen *pro re nata*, and *functus* after the comprising was completed, an extract under his hand was no better than an extract under the hand of any other private person. Durie, 17th July 1627, Ker *contra* Minister of Ancrum.

Extract from the publick register. A WRIT lying in the King's register, tho' it bear not registration, may be extracted by the clerk-register, and a copy thereof subscribed will make as great faith as the principal, except in improbations. Haddington, 27th November 1622, Earl Mar *contra* Lord Elphinston.

Extract, if a sufficient warrant for arrestment ? AN extract of letters of horning, wherein was contained a warrant for arrestment, was found no sufficient authority for a messenger to lay on an arrestment, and that the party was not bound to regard the arrestment, unless the principal letters had been shown to him. Upon which footing, a posterior arrestment was preferred in a competition. Durie, Spotiswood, (*Arrestment*) 26th March 1629, Duff *contra* Boyd.

Private Deed how far probative ?

If probative against Creditors of its onerous Cause ?

Deed in favour of a conjunct and confident person, where bankruptcy ensues. A BOND bearing *borrowed money*, granted by a bankrupt to a conjunct and confident person, found to prove its onerous cause; and it was found incumbent upon the pursuer of the reduction to redargue the same by the defender's oath or writ in terms of the act. Durie, 22d January 1630, Hopepringle *contra* Ker. Durie, 28th January 1625, Livingston *contra* Abernethy. Durie, 22d June 1642, Nisbet *contra* Williamson. — In a reduction upon the act 1621, of a bond granted by a bankrupt to his brother, bearing *borrowed money*, and of an

Private Deed how far probative ?

an adjudication following upon it, the Lords thought, that tho' bonds *inter conjunctas* may prove, if dealing in commerce appear, yet in the present case, where no such thing was alledged, and where the creditor's circumstances made it extremely improbable that he could have advanced such a sum, they found the narrative of the bond not probative. Fountainhall, Forbes, 5th December 1707, M'Leerie *contra* Glen.

ONE having disposed his whole heretage to his son-in-law, upon the narrative of a price paid, whereby he was rendered bankrupt, the disposition was found probative, unless redargued by the disposer's oath. Durie, 17th January 1632, Skene *contra* Betson. — A disposition by a bankrupt to his brother, bearing to be for security of a sum instantly borrowed, the same cannot be taken away but by the dispo-see's oath; and the Lords considered, that this was not the same case with that of a disposition, bearing onerous causes in general, which must be otherwise instructed than by the disposition. Gosford, 28th November 1673, Campbell *contra* Campbell. — A merchant who had a considerable stock, having obtained a disposition of lands from a brother, bearing a price paid, upon which he was infest and in possession some years before the disposer's circumstances were suspected, the narrative of his disposition was found sufficiently instructed; by production of the retired bond granted by him for the price. Home, 15th February 1728, Skene of Pitlour *contra* Forbes of Kincardin. — A right granted by a bankrupt to his own son, a young man living in family with him, reduced as gratuitous, tho' the right bore to be for sums of money and onerous causes, and the defender offered his oath in supplement. Durie, 9th March 1639, Riddoch *contra* Younger. — The like. Stair, 12th February 1670, Napier *contra* Gordon.

A FITTED accout betwixt an insolvent person and his brother-in-law, containing many articles for a long course of time, paid to third parties upon the insolvent person's account, was found to prove its onerous cause, and to support a bond granted for the balance, upon which adjudication was laid, so as to save it from a reduction upon the first head of the act 1621. Forbes, 4th July 1711, Gray *contra* Chieffy.

THE narrative of a disposition by a bankrupt to his son, bearing debts particularly condescended on, undertaken by the son, was found sufficiently supported, the son offering to prove by the creditors mentioned in the disposition, that he had paid to them the sums particularly expressed therein, tho' it was objected, That each creditor was but *singularis testis*, and that he ought to have preserved the retired bonds, and to instruct, that these debts were truly resting by the bankrupt at the date of the disposition; in respect it was answered, That tho' each creditor would be but *singularis testis* with regard to his own debt, they would be concurring witnesses with regard to the onerous cause in the disposition, and there could ly no obligation upon the defender to preserve retired bonds for so long a time as a reduction might ly against him, and that the debts were resting at the date of the disposition proved itself, unless redargued by a contrary proof. Stair, 9th January 1672, Robertson *contra* Robertson. — A disposition by one brother

Private Deed how far probative ?

ther to another, bearing to be for security of certain sums, due by bond, was found sufficiently astructed by production of the bonds, unless the pursuer would offer to prove, that the common debtor was actually insolvent, or holden and repute bankrupt when he granted these bonds to his brother. Here there were no suspicious circumstances founded on, other than the conjunction itself, and if such a proof of the onerosity were not held sufficient, all commerce would be barred amongst relations ; it might be said, that even a proof by witnesses of the actual delivery of the money would not be sufficient, which might be done simulatly in order to support a bond, as well as a bond be granted simulatly in order to support a disposition. Fountainhall, 22d February 1711, Rule *contra* Purdie.

AN assignation made by a bankrupt to a conjunct and confident person, bearing (as appears from the following decision) to be in security of sums addebted to the assigney, was presumed to be *in fraudem creditorum*, and that it was not needful the creditor should prove it to be for no just or necessary cause, this being a negative ; and therefore, that the assigney ought to qualify the just and necessary cause. Durie, Haddigton, 12th February 1622, Denniston *contra* Young. — And the assigney qualifying, that he took the assignation for behoof of a third party who was a creditor to the bankrupt ; the Lords sustained the assignation, tho' disconform to the narrative of the deed. Hope, (*De creditoribus*) 27th February 1622, Denniston *contra* Young. — An assignation made by a bankrupt to his brother, bearing to be for security of debts owing to him, found reducible, unless the assigney would instruct, otherwise than by his own oath, that he was creditor. Durie, 29th January 1629, Auld *contra* Smith. — The like. Stair, 15th July 1670, Hamilton *contra* Boyd.

A DISPOSITION of lands by a bankrupt to his brother, bearing onerous causes in general, was not sustained as probative of its narrative in prejudice of prior creditors, but it was found incumbent on the disponee to astruct the same. Stair, 29th November 1671, Whitehead *contra* Lidderdale. — And he having condescended, that it was for a sum of money, advanced *in specie* to his brother, which he offered to depone upon ; the Lords found this not relevant. Stair, 14th December 1671, *inter eosdem*. — In the like case the disponee having produced two bonds due to him by the disponent, and offering to give his oath, that these were the onerous cause of the disposition ; the Lords found this relevant. Stair, 15th December 1671. Duff *contra* Forbes of Culloden.

A LIFERENT infestment of his whole estate, granted by a bankrupt to his wife during the marriage, bearing, “ in satisfaction of an “ anterior contract of marriage, which the husband had cancelled, ” was not found probative of its onerous cause ; and therefore reducible in so far as exorbitant. Stair, 19th January 1676, Stanfield *contra* Brown. — A lucrative tack, set by a bankrupt to his father, bearing to be in implement of a promise made when the lands were disposed to the now bankrupt in his contract of marriage, found not to prove its onerous cause against a creditor. Durie, 24th November 1626, Glen *contra* Binnie.

A BOND

Private Deed how far probative?

A BOND bearing borrowed money, granted to one who was neither a conjunct nor confident person, after the granter was denounced rebel at the instance of another creditor, was found probative of its onerous cause against a reduction, upon the first clause of the act 1621. Stair, 28th June 1665, *Monteith contra Anderson*. --- The narrative of a disposition, bearing for sums of money paid, and debts undertaken of the disponers, conform to an inventory, was found sufficient to instruct the onerous cause against a reduction, upon the first clause of the act 1621, the buyer not being a conjunct and confident person; and the Lords would not so much as burden the disponent's heir with a production of the inventory. Stair, 22d June 1680, *Trotter contra Home*. --- In a reduction, upon the act 1621, of a disposition, by a man who had no children, of his whole estate, to his nearest relation a cousin german, bearing, *for sums of money, and for other causes and considerations*; the Lords, tho' the defender was not properly a conjunct person in the eye of law, ordained him to instruct, so far as he could, the cause onerous, reserving to themselves how far it should operate; here it was pleaded, That a narrative, bearing *other causes and considerations*, is understood to be *for love and favour*, even betwixt strangers, and not for an adequate cause onerous. Stair, 22d June 1680, *Sinclair contra Dickson*.

Where the deed is in favour of a person neither conjunct nor confident.

In a process upon the passive titles against an heir conveyed as successor *titulo lucrativo*, the narrative of the disposition, bearing a price truly paid, was found probative, unless redargued by the defender's oath. Durie, 21st March 1634, *Watson contra Orr*. --- But where the disposition bore, in general, to be for sums of money, the heir was found obliged to instruct the onerous cause. Stair, 15th February 1676, *Hadden contra Halyburton*.

Disposition to an heir post contractum debitum.

AN assignation of a bond to a conjunct person, bearing onerous causes in general, was found not to prove its onerous cause to bar compensation pleaded for the debtor, tho' the liquidation was posterior to the intimation of the assignation. Stair, 18th January 1676, *Crocket contra Ramsay*. --- A second disposition of the same subject to a conjunct and confident person, first completed by infestment, bearing onerous causes in general, proves not its narrative against the first disponent; and a bond for a large sum of money of the same date with the disposition, but not referring to it, found no instruction of the onerous cause; for both, probably, were meant as donations; and if the first disponent was preferable, the second disponent could have it in his power to prefer himself *ex post facto*, by giving a valuable consideration, which he would do by discharging the bond. Forbes, 24th January 1706, *Wilson contra Lord Saline*.

Assignation to a conjunct and confident person where there is no bankruptcy.

A DISPOSITION from one to his brother-in-law, bearing onerous causes, was found reducible at the instance of the disponent's creditors, unless the disponent would either instruct an antecedent onerous cause, or condescend upon an estate in the disponent's person, free of incumbrances, able to answer all the debts. Fountainhall, 18th June 1712, *Scot contra Ker*.

Who understood a conjunct person?

Private Deed how far probative?

A STEP-FATHER and step-son are conjunct persons in the eye of the act 1621. Fountainhall, 16th January 1695, Mercer *contra* Dalgarno.

THE Lords refused to reckon uncle-in-law and nephew-in-law conjunct persons in the sense of the act of parliament 1621, because such a tie of affinity is no declinator of a judge, act 13, parl. 1681. Forbes, 8th February 1712, Lord Elibank *contra* Adamson.

IN a reduction upon the act of parliament 1621, the Lords found, That a cousin-german was not a conjunct person, so as to oblige him to prove the onerous cause of his disposition, otherwise than by its own narrative. Fountainhall, 6th December 1679, Sinclair *contra* Dickson. Forbes's MS. 8th June 1714, M'Doual *contra* Fullarton.

Who a confident person?

A FACTOR who had run in considerable arrears, granting a disposition to particular subjects for his constituent's security, and the same being challenged upon the act 1621 by his other creditors, as being a deed betwixt confident persons, and therefore not probative of its onerous cause; the Lords assilzied from the reduction, because, in the eye of law, a constituent is not a confident person with regard to his factor, tho' a factor may be with regard to his constituent; besides there was a clear claim instructed against the factor upon his factory, *viz.* the bygone rents, with which he did, or ought to have intromitted with, unless it had been taken off by a proof that the same was compted for and cleared. December 1728, Dutcheffs of Buccleugh *contra* Sinclair and Doual.

If probative of its onerous cause against a donatar of Escheat.

A discharge, bearing payment of a bond granted to a brother by a rebel, denounced, and in prison for debt, was found not to prove its onerous cause against a donatar of escheat, and that the payment behoved to be otherwise instructed. Stair, 15th January 1679, Cranston *contra* Kyle. --- A bond granted after horning, bearing to be for the price of wines, was not found probative of its onerous cause against the donatar of escheat, tho' it did not appear that the creditor was a conjunct and confident person; but he was allowed to instruct the onerous cause, by the rebel's compt-book and books of entry, he being a merchant; and the Lords refused to sustain a proof simply by witnesses, without such adminicles in writ. Dirleton, 20th December 1676, Veitch *contra* Pallat.

In what Cases not probative against the Heir?

Obligation bearing or importing onerous causes.

A BILL granted upon death-bed, found not to prove its onerous cause. February 1734, Christifons *contra* Ker. --- A bond bearing onerous causes granted upon death-bed, proves not its narrative against the heir; but the creditor offering to instruct the onerous cause, and condescending upon victual sold to the defunct, the delivery of which he would prove by witnesses; the Lords found the same relevant. Spotiswood, (*Contracts*) Durie, 13th July 1632, Fairholm *contra* Browns. --- In the same cause, an article of the condescence being victual delivered to the defunct's father, this was refused to be sustained

Private Deed how far probative?

ed as onerous, not being the defunct's debt, unless the creditor would alledge and prove, that the defunct was liable for his father's debts. Durie, Spotiswood, *ibid*.

FOUND, That a bastard cannot prejudice the King of a sum resting to him, by declaring on his death-bed, That, upon his conscience, that sum pertained not to him, but to another who borrowed his name to the bond. Haddington, 10th December 1623, *Craw contra* .
 —A father on death-bed calls his son, and declares, That the right of such an apprising standing in his person is but in trust, and takes his promise to denude of it to the true party, accordingly the boy afterwards grants an obligation to that effect, but, being minor, he was induced to revoke it; the Lords, from a principle of conscience, allowed a trial by witnesses, or otherwise, if the father was heard at any time in his health, to acknowledge this right to be only a trust, but did not sustain his declaration *in lecto*. Fountainhall, 22d November 1687, *Crawford contra Bell*. — A person upon death-bed having executed a declaration of trust, with relation to an estate in his person, the declaration was found not probative against the heir, unless supported by other adminicles. Dirleton, Gosford, 9th June, Stair, 26th November 1674, *Paton contra Stirling*. — A declaration by the debtor, that he had abstracted the instrument of debt from the creditor, sustain'd as a pregnant adminicle in a process of tenor, tho' the declaration was granted on death-bed. Dalrymple, 21st November 1707, *Waddel contra Waddel*. Declaration.

THAT the tocher, which was payable by the wife herself, was, *de facto*, paid by the subsistence of the marriage for 22 years, and the husband's acknowledgement in his testament, tho' upon death-bed, was found a sufficient proof against the heir. Stair, 16th February 1671, *Dods contra Scot*. Payment acknowledged upon death-bed.

A MAN in his testament executed upon death-bed, among his other debts, having mentioned one he was due of 100 merks, the testament supported by a proof by witnesses, that the defunct had intromitted with the like sum belonging to the creditor, and had paid a year's annualrent, found probative against the heir. Gosford, 17th June 1673, *Thallane contra Orrock*. Debt acknowledged.

A DECREET obtained against a man upon death-bed, holding him as confessed upon a promise of payment of £. 500, being challenged by the heir, in a reduction, as not probative against him; the defender pleaded, collusion is not to be presumed, where the verity of the alledgeance is instructed by oath, which is stronger than an acknowledgement in writ, and, being held as confessed, is equivalent to an explicate oath, which, being transacted in judgment, is a legal proof; and there is a wide difference betwixt judicial steps, and private deeds, the last are changeable for want of power in the granter, who is restrained from doing deeds upon death-bed to hurt his heir, the other cannot be challenged, unless collusion be qualified and proved. Answered,

Private Deed how far probative ?

Answered, If a decret, holding a man as confessed upon death-bed, was sustained, the law of death-bed would be no sort of security to heirs. The Lords inclined to find the reason of reduction relevant, in these terms, *viz.* That the predecessor was upon death-bed the time of litiscontestation, and that it was not sufficient to alledge he was on death-bed at the taking of the term, or the time of circumduction, because litiscontestation is a judicial contract, binding upon parties, which contract must be fulfilled in the terms thereof, whether parties be in health or sickness. But, before answer, a joint probation was allowed as to the state of the predecessor's health the time of litiscontestation. Harcus, (*Lectus agritudinis*) March 1682, Sir William Nicolson *contra* Dick of Grange.

Acknowledgement of resting owing.

A YOUNG man upon death-bed having granted bond to his mother, narrating, That he had been 15 years maintained and educated by her, for which it was reasonable she should have allowance, therefore he obliges himself to pay the sum of 5000 merks at the first term after his decease; it was objected, That the privileged aliment was prescribed by the lapse of three years. Answered, That a debt prescribed only *quoad modum probandi*, does not cease to be a lawful debt, and as the pursuer might have brought an action against the defunct, obliging him to depone on the verity of the debt, the acknowledgement that the aliment was resting, must have the same effect. The Lords found, That the bond upon death-bed, bearing the cause to be for alimenting, excludes the defence of prescription. 2d February 1725, Ross *contra* Moubray.

Declaration on death-bed not probable by witnesses.

A COMPRISER having declared on death-bed, That the sum comprised for was paid, except *L. 40*, and desiring that his heirs and executors should seek no more, and the said declaration being offered to be proved by witnesses above all exception; the Lords found it not relevant to be proved by witnesses. Durie, 7th July 1636, Nicolson *contra* Burnet.

In what Cases not probative betwixt the Granter and Receiver ?

Obligation granted by a person interdicted.

A BOND granted by a person interdicted, to a workman for his wages, without consent of his interdictors, found not probative of the onerous cause; but the Lords allowed the creditor to bring evidence of the onerous cause. Durie, 29th July 1624, Ld. Collington *contra* Faa. --- The like, with regard to a bond granted for furnishing. Fountainhall, 22d June 1697, Bowman *contra* Earl Kilmarnock. --- In a like case, the creditor condescending upon the onerous cause of the bond, *viz.* That it came in place of a prior bond good against the interdiction; the Lords would not sustain this to be proved by the writer and witnesses to the bond, because it did not bear this onerous cause. Durie, Hope, (*Interdiction*) 11th December 1622, Seaton *contra* Creditors of Atchison. --- A disposition made by a person interdicted without consent of the interdictors, was allowed to be supported

Private Deed how far probative?

ported by a proof, That the price was applied *in rem versum*. Gofford, 27th February 1672, *contra*.

IN a pursuit for payment of a bond granted by a husband to his wife *stante matrimonio*, at the instance of the wife's executor against the husband, which was alledged not revocable by him, as bearing for an onerous cause, *That he had gotten bonds from her to the value*, presumed to be heretable bonds, which fall not under the *jus mariti*, unless he will show the contrary. The defender insinuated somewhat of his wife's melancholy at that time, which moved him to comply with her humour in granting the bond. The question was, On whom the *onus probandi* lay, that the bonds referred to were heretable or moveable; the Lords, in this circumstantiate case, found the *onus probandi* to ly upon the pursuer, and that she might have the defender's oath as to the nature of these bonds. Fountainhall, 21st January 1703, Gray *contra* Scot.

THE confession of a minor in a criminal matter, was found probative against himself, and not reducible *ex capite minorennitatis & lésionis*. Falconer, Fountainhall, 6th November 1683, Schaw *contra* Vanse.—But a bond null wanting the curator's consent, was not found supported by the minor's acknowledgment in the bond, that the money was *in rem versum* of himself, which is no sufficient proof. Stair, 24th February 1672, Corser *contra* Deans. — A disposition by a minor who had no curators, bearing a price paid, found not probative against him of the onerous cause. Dirleton, 12th December 1666, Thomson *contra* Stevenson.

IN a reduction of a bond upon minority and lesion, the lesion appearing *ex facie* of the bond, which bearing to be for borrowed money, did not prove its narrative; and *esto* it did, not relevant, unless the defender would prove *in rem versum*; the defence was, That the bond was for the price of the teinds of the minor's own lands purchased by him; which partly appeared, in that the bond and disposition were of the same date; and that this was truly the matter of fact, he offered further to instruct by witnesses. Answered, A proof by witnesses cannot be admitted to contradict the narrative of the bond. The Lords before answer admitted the witnesses to be examined. Durie, 28th July 1637, Lord Dunipace *contra* Littles.

A WRIT granted by a person who was blind, being challenged as not probative, he not being capable to know to what he set his name; the objection was repelled, in respect that a blind person has the same access to be informed, which they have who see and cannot read. Stair, 21st June 1681, Coutts *contra* Straiton.

Deed without Witnesses if probative?

IF a writ bear to be holograph, it is a sufficient proof, unless the contrary be proved. Durie, 9th December 1635, Earl Rothes *contra* Leslie.

Private Deed how far probative ?

What words
import holo-
graph ?

A Docquet in the following words, *In witness whereof, I have subscribed these presents, &c.* does not import the writ to be holograph; and therefore the party was forced to offer a probation of holograph, *comparatione literarum*, and by witnesses who saw it written and subscribed. Forbes, 11th, Fountainhall, 12th June 1711, Donaldson *contra* Walker.

Holograph
writ, if proba-
tive of its date
against credi-
tors ?

A HOLOGRAPH bond does not prove its date against an arrester, and therefore after an arrestment was laid on, a creditor by a holograph bond having pointed the goods, repetition was found competent to the arrester, in regard the holograph bond might have been granted by the common debtor after the subject was rendered litigious by arrestment. Stair, 20th January 1672, Bell *contra* Fleming. --- An assigney to a bond having writ to the debtor for payment, the debtor's holograph missive, without witnesses, which in law is equivalent to an intimation, was found probative of its date, so as to prefer the assigney to another creditor, who arrested the sum after the date mentioned in the letter. Durie, 22d January 1630, *contra* --- The contrary. Fountainhall, 22d July 1708, Gray *contra* Earl Selkirk. --- A holograph bond proves not its date against an inhibitor. Stair, Gilmour, 21st June 1665, Braidie *contra* Ld. Fairny.

If probative
against the
husband ?

A HOLOGRAPH bond granted by a woman before her marriage, is not good against her husband, because of the hazard of antedating. Durie, 20th January 1636, Temple *contra* Lady Whittingham.

If against
the heir ?

A HOLOGRAPH bond proves not its date against the heir, and therefore liable to an objection, That it might have been granted on death-bed, unless the creditor can support the verity of the date. Gosford, 14th November 1668, Calderwood, *contra* Schaw. --- The like. Stair, 24th June 1681, Dows *contra* Dow. --- A holograph disposition by a father to his eldest son of the second marriage, being quarrelled by the heir as presumed done on death-bed, tho' dated two years before the granter's death, who died of three days sickness; the Lords found, That they could not alter the fixed principle, That holograph writs prove not their dates; and therefore reduced, tho' the party had been in peaceable possession ever since his father's decease, which was 20 years before; but the defender was allowed to be heard on presumptions for eliding it, *viz.* That it was read or seen by any in the father's *liege poustie*, or that he was so short a while sick, that he could not writ in that space, and touching the long peaceable possession, and such like circumstances, to fortify and adminiculate the date of the writ. Fountainhall, 27th June 1699, Ross *contra* Ross. --- A man having granted a holograph disposition of some lands to a second son with the burden of two liferents, and some other debts; in a reduction of the disposition, at the instance of the eldest son, as being holograph; the Lords sustained the disposition only for a security of the onerous cause for which it was granted. Fountainhall, 25th December 1702, Gordon *contra* Ross. --- A man having made a settlement of his affairs, obliging his eldest son, failing heirs of his body, to surrender the estate to other persons named, and,

Private Deed how far probative ?

and, about a year thereafter, discovering upon that son's death a defect in his settlement, that he had not brought his other sons, succeeding to the estate, under the said obligation, and to supply the defect, adding a holograph postscript to the deed of settlement, the Lords found the holograph postscript probative of its date, being supported by the deed of settlement to which it was adjoined, and so suitable thereto, that there could be no reasonable suspicion that it was antedated, to avoid the objection of death-bed. Stair, 15th December 1677, Nicolson *contra* Nicolson.

IN a reduction of a holograph testament made by a boy of 14 years, the reason being, That *non probat datam*, and so is presumed to have been done in pupillarity; and tho' it was answered, That holograph deeds may be antedated to shun death, but that the presumption of postdating has no place; yet the Lords presumed it to have been done in his pupillarity, unless the contrary were proved. Fountainhall, 25th March 1686, Aiton *contra* Napier. — But upon a review of this case, the Lords thought this a dangerous interlocutor, as tending to annul holograph testaments executed by parties in their latest years; and therefore refused to adhere to it *in tota latitudine*, but reduced the testament as presumed done in pupillarity upon the following special circumstances, That the testator was a sickly boy, and *de facto* died within seven months after his age of 14, and that his mother had elicited two other testaments from him (reduced upon certain informalities) which she had no occasion to do, had the testament in question been valid and effectual in law. Fountainhall, 21st February 1694, *inter eosdem*.

A BILL proves its date against the heir. Home, February 1725, Bill of exchange probative of its date. Kennedy *contra* Arburthnot. — The like. 12th February 1731, Johnston *contra* Strachan.

A HOLOGRAPH discharge, without witnesses, by a mother to her son, found not to prove its date against a singular successor in the mother's right. Haddington, Hope, (*Probation by writ*) 28th November 1611, Lord Forbes *contra* the Marquis of Huntly. — A holograph discharge wanting witnesses, tho' granted to a debtor, who was no conjunct or confident person, found not probative of its date against an onerous assigney. Stair, 14th January 1662, Dickie *contra* Montgomerie. — A titular of teinds having insisted in a reduction of a tack set by him upon a clause irritant, his holograph letter, without witnesses, discharging the process, was found to be probative of its date against an assigney to the said tack, to whom the titular had also set a new tack of the same teinds. Durie, 12th February 1629, Lord Leslie *contra* Ld. Boquhen. — A discharge to a tenant sustained upon the master's bare subscription, and that against an onerous assigney, the tenant making faith, that he received the same from his master before the assignation. Stair, 7th November 1674, Boid *contra* Storie. — But discharges granted by a tutor to his pupil's tenants in the above form, were not sustained to instruct an article of compensation against the tutor's assigney. Marcus, (*Compensation*) January 1684, Bruce *contra*

Private Deed how far probative ?

tra Buchan. ---- Prescription being proponed against a bond, by the principal debtor who was sued for payment, the pursuer produced a holograph receipt for a year's annualrent, granted by the creditor to the cautioner in the bond, and insisted upon the same as a sufficient interruption. Answered, A holograph writ does not prove its date against third parties. Replied, The defender, in this case, is not a third party in the sense of the brocard. A discharge granted to a cautioner is equally available to the principal, and as a holograph receipt granted to a cautioner is a good proof of payment in every question with the principal, if it prove for him that payment was made, it must prove against him that interruption was made, because this very payment makes interruption. The Lords found the prescription interrupted by the holograph discharge. 17th June 1737, Sir John Scot of Ancrum *contra* Sir Robert Douglass of Glenbervie.

What if the
debtor died
suddenly ?

In a pursuit upon a holograph bond against an heir, it was found sufficient to take off the presumption of its being granted on death-bed, That the granter died suddenly of a violent death, having never spoke or done any deed after receiving the wounds whereof he died. January 1730, Rofs *contra* Rofs. Fountainhall, 19th February 1703, Graham *contra* Creditors of Stamfield.

Accompts, Compt-books how far probative.

Compt-book. In a competition of creditors upon a defunct's executry, one having no document for his claim, but an accompt ingrossed by the debtor in his compt-book ; the Lords thought it hard to bring him *in pari passu* with others who had more formal documents, but declared, That if he could prove the delivery of the particulars mentioned in the accompt, and give his oath in supplement, they would bring him in equal with others. Durie, Spotiswood, (*Creditor*) 20th January 1631, Creditors of Brown competing. — A defunct's compt-book found probative against his heir, wherein he acknowledged, that he had borrowed a certain sum, and mentioned in distinct articles the payment of several years annualrents. Stair, 7th, Dirleton, 8th June 1677, Purveyance *contra* Cuninghame. — A merchant's current compt-book is probative against him, tho' unsubscribed: It is not so where the pursuer only founds upon loose schedules of paper. Stair, 1st July 1665, Nasmith *contra* Bower. — An article in a compt-book found also probative against him, tho' the party was not a merchant. Stair, 17th December 1675, Lawrie *contra* Drummond.

A PERSON pursuing for a debt, assigned to him by a merchant, it was alledged by the defender, That the debt stood discharged in the cedent's compt-books ; the Lords finding, That the book was an entire and fair merchant-book, wherein the precise sum was posted, marked received of a date anterior to the intimation of the assignation, they sustained it equivalent to a discharge. Marcus, (*Discharges*) March 1683, Currier *contra* Halyburton. — To the same purpose. Stair, 4th February, 19th July 1662, and 8th January 1663, Skene *contra* Lumisden. — A holograph compt-book, tho' not subscribed, found a suffi-

Private Deed how far probative?

a sufficient instruction of payment made by the defunct's tenant, and that against an executor-creditor who had confirmed the rent; in this case the defender was ordained to give his oath in supplement, that he had paid according to the compt-book. Stair, 20th November 1662, Wardlaw *contra* Gray. — In a process against tenants at the instance of their master and his curators for bygone rents, their defence being, payment to your late tutor and factor, as appears by his compt-book, all written with his own hand, tho' neither subscribed nor regularly kept; the Lords, nevertheless, found this holograph compt-book sufficient to exoner the tenants. Fountainhall, 6th July 1710, Watson *contra* Tenants.

A TENANT being pursued by a chamberlain's representative upon a bill, and the tenant producing a fair accompt in the chamberlain's ^{Detached} ^{accompts.} hand-writing, tho' not subscribed by him, wherein this debt was entred amongst many other articles, and mentioned to be paid; the Lords sustained this accompt, being in the tenant's hands, as probative of the payment. Fountainhall, 13th February 1696, Ainslie *contra* Chisholm. — A holograph accompt of charge and discharge, being recovered from amongst a man's papers, after his decease, wherein he gives credit for a certain sum; this was found probative against his heir for payment of that sum, notwithstanding of the brocard, *chyrographum non probat datam*. Forbes, 19th February 1708, Miller *contra* Bonar.

Extrajudicial Declarations, Certificates.

A PERSON being excommunicated, and so *non habens personam standi in judicio*, yet producing letters testimonial from the bishop, bearing, that he was absolved; the Lords found, That this did not sufficiently prove the absolution, *nisi constitisset ex ipsis curiæ actibus*. Sinclair, 28th June 1542, Ld. Chirnside *contra* Lord Home. — The testimonial of a minister concerning a person's age, is not a sufficient probation, but an adminicle only. Auchinleck, (*Probation*) 20th July 1628, Cuming *contra* Cuming. — A testificate from the Lyon King at Arms, not sustained as a proof, That a messenger was deprived by a sentence; this was in a process against magistrates, who refused to take a prisoner offered to them by the messenger. Durie, 25th July 1626, Smith *contra* Bailies of Northberwick. — Certificates or declarations do prove nothing, unless where they are taken in processes by commission. Stair, 4th February 1662, Skene *contra* Lumisden. — The like. Gosford, 28th January 1670, Wisheart *contra* Davidson. Stair, 13th January 1676, Bell *contra* Robertson. Fountainhall, Forbes, 28th February 1708, Creditors of Colquhoun competing. — In a competition of creditors on a bankrupt estate, the Lady for her jointure being preferred to them all, to take effect at her husband's decease; and he being killed abroad in battle, and she now producing declarations under the hands of other officers, that he was dead, and that they were at his burial, &c. but without depon-

Proved or not proved.

ing, or any other commission sent to them for that purpose, they all being prisoners in an enemy's country; the Lords found these declarations sufficient in this circumstantial case to prove his death, there being nothing produced to cancel them as suspect. Fountainhall, 1st July 1708, Creditors of Cleland competing.

EXTRAJUDICIAL confession, that goods in the constituent's custody did belong to such a man, was found sufficient probation, there being instruments taken thereupon. Balfour, (*Confession*) 7th June 1559, Rutherford *contra* Dempster.—A person having in the church made publick confession of the crime of adultery, and stood in sackcloth for a year, and taken remission from the King, this was found to be but an *extrajudicialis confessio* and no proof *ad civiles aut criminales effectus*; and as for the remission, neither was it sufficient probation, seeing remissions are frequently taken to prevent accusations and trouble. Stair, 9th January 1662, Baird *contra* Baird.

Proved or not proved.

Adultery.

ADULTERY was found proved, tho' not any two of the witnesses concurred in the same individual act; for in such crimes, which allow of reiteration of acts, all proceeding from the same *animus*, like so many links of a chain, the *sempiterna probatio* of every one fortifies the whole, and makes it equivalent to the full proof of two concurring witnesses to one specifick act: Which must hold, especially where the pursuit is not capital, but, as in adultery, to annul the marriage only, or restore the jointure. Stair, 25th February 1667, Lady Milton *contra* Ld. Milton.

Bargain of moveables.

ONE witness, with a merchant's compt-book, and his own oath in supplement, upon the prices and delivery of the goods, were found sufficient to constitute a debt against the buyer's executors, tho' above L. 100. Gosford, 5th June 1672, Wood *contra* Kello.

Bastardy.

IN a declarator of bastardy, this exception found relevant, That the father and mother of the alledged bastard did cohabit together for ten years as a married couple, and were reputed to be so, notwithstanding of a reply, that the defunct, whose bastardy was sought, was universally habite and reputed a bastard. Durie, 7th July 1626, Somervell *contra* Ld. Halcro. ---- The like. Stair, 15th January 1676, Swinton *contra* Kaills.

IN a declarator of bastardy, tho' the pursuer cannot be bound to instruct, that the father and mother of the alledged bastard were not married, it is incumbent upon him to go as far as he can in a proof of this negative, *viz.* That the defunct was holden and reputed bastard at the time of his death. Stair, 19th February 1669, King's Advocate *contra* Craw. ---- The like. Stair, 15th June 1670, Livingston *contra* Burns. Stair, 6th January 1680, Somervell *contra* Stains. ---- A donatary to a gift of bastardy was found obliged to condescend upon the mother's name, and to prove that the defunct was habite and reputed a bastard,

Proved or not proved.

a bastard, *quo casu* they found, that the son must prove lawfully married, seeing negatives prove themselves. Gosford, 13th January 1670, Cuningham *contra* Montgomery.

THE Lords found this exception, That the person alledged to be bastard was 80 years of age, and was reputed lawfully begotten, relevant, unless the pursuer would condescend upon the name of the bastard's father and mother, and alledge certain circumstances that they were never married, or that the defunct was esteemed bastard. Hope, (*Bastard*) 13th January 1615, Rae *contra* Rae. Haddington, 11th January 1611, Chirnside *contra* Williamson. — In an action at the instance of a donatar of bastardy, against possessors of lands that belonged to the alledged bastard, this defence was sustained, *viz.* That it was 30 years since the person's decease, and that he was 40 or 50 years old before he died, so that now there could be none living to prove the marriage or cohabitation of his parents, nor was his legitimacy ever called in question till now, this therefore the Lords found a dangerous preparative at so long a distance of time, to call in question *statum defunctorum*, which may concern all the lieges who are of any age, and therefore found no process on the gift, the above alledgeance being proved. Hope, (*Bastard*) 10th January 1618, Hope *contra* Scot. Durie, 25th February 1642, Crawford *contra* Purcells.

LEGITIMATION accepted by the defunct from the King, is a sufficient evidence of bastardy. Stair, 19th February 1669, King's Advocate *contra* Craw.

THE Lords found, That a merchant having set sail three years before, and neither ship nor men returned, but reputed perished; the person was to be presumed dead. Haddington, 17th June 1613, *contra* . ---- *Vita præsumitur nisi mors probetur ordinariæ*; yet a pregnant presumption of death, *viz.* That the person alledged to be dead, embarked in a ship to make a voyage to Norway at All-hallowmas 1620, and that the ship nor none in her ever returned, nor was heard of, and so behoved to have perished in the ship, will be found relevant. Haddington, 27th June 1622, Erskine *contra* Tenants of Tillibody. ---- Eighteen years absence, and being holden and reputed dead, was found a sufficient probation to take off the presumption of life. Stair, 18th February 1670, Laurie *contra* Drummond. --- The like. Stair, 19th June 1663, Hay *contra* Corstorphin. ---- The Lords found the following evidences sufficient to instruct a man's death: A proof that he was a privateer, and so *versans in periculis*; a report at Barbadoes where he resided that he was dead; his not returning to Scotland where he had a considerable estate; his having been 11 years from his wife, and three since he writ to her. Stair, 7th December 1678, Sands *contra* her tenants. ---- A sailor having gone upon a voyage to the East-Indies, and not heard of for 19 years; this, with the depositions of the clerk and book-keeper of the East-India company, That one of that name had been hired by the company about the time mentioned, that they heard no more of him, and that he was commonly held and reputed to be dead, found a sufficient instruction of death to entitle his relief to her legal provision. Fountainhall, 19th

Death.

Proved or not proved.

June 1706, Hog *contra* Home of Whitfield. ---- The Lords presumed a son to be dead, from his father's burdening a disposition of his estate with his other childrens provisions, without mention of his; and from this, that the father, in a pursuit against him for what belonged to the son, upon the pursuer's referring to his oath that he was dead, acknowledged that he feared the worst. Forbes, 4th December 1707, Aitken *contra* Guidlets. ---- A sailor going to the East-Indies, and giving bond to his landlord at London for a sum payable at his death out of his estate in Scotland, and some years thereafter the landlord having procured the affidavits of two of the ship's crew made at home-sessions in London, deponing, That he was dead, with the time and place of his death; only their oaths, tho' they gave both his name and surname, mentioned him as Captain of another vessel than that named in the bond, neither did the affidavits name him *Scotsman*, nor by his stile, nor design the county he belonged to, all which had been done in the bond; yet the Lords found, That the affidavits made a presumptive probation of his death, but ordained the landlord pursuer to find caution to restore, in case it should afterwards appear that he was alive, or that it was another man. Forbes, 20th, Fountainhall, 21st December 1710, Henderson *contra* Morton.

That a decret was extracted.

IN order to verify an exception of *res judicata*, the defender, who produced the whole warrants of the decret, to prove that the same had been extracted, tho' the extract was now amissing, adduced an attestation under the hand of the keeper of the minute-book, that the dues were paid, which was alledged never to be done till after extracting, and appealed to the responde-book in the clerk's chamber, where the decret is marked by the extractor as extracted; this was not found a sufficient probation, in regard the decret was not found booked, and that extracts are often allowed to ly in the clerk's hands, without being signed or taken out. Forbes, 3d July 1705, Dickson *contra* Miln.

That the party did not give authority to the notary to subscribe for him.

THE Lords sustained this reason of reduction of a bond, to be proved by the witnesses insert, *viz.* That they did not hear the pursuer give mandate to the notary to subscribe for him. Fountainhall, 20th February 1678, Storack *contra* Cheyne.

Forgery.

THE notary and one witness approbating, and the other witness improbating, the instrument was found improbated. Balfour, (*Improbation*) 14th March 1541, Scot *contra* Blair. ---- In an improbation of an instrument, all the witnesses being dead except one, who, with the notary, approbated the writ; the Lords found, That the same could not be improbated. Balfour, (*Improbation*) 18th December 1562, Wood *contra* Cramond. ---- The Lords refused to improbate an instrument, altho' there were but two of the witnesses living, one of whom improbated and the other approbated the writ, and the notary first denied and the next day own'd it. Maitland, 6th May 1553, Cuninghame *contra* Lady Semple. ---- The messenger and one of two witnesses being dead, and the other living witness improbating the execution, it was thereby

Proved or not proved.

thereby found improbated. Balfour, (*Improbation*) ult. June 1565, King's advocate *contra* Todrig. ---- One of two witnesses to the execution of an arrestment being dead, and the other denying, and the messenger saying *non memini* unless he saw the writ, (the copy produced being only drawn out of the official books of Lothian;) the Lords, in respect that the messenger being a publick person, with one witness, was sufficient to make faith against another witness, found the execution not improbated, and therefore assilzied from the punishment, but declared that the execution should make no faith. Maitland, 16th July 1565, Wauchop *contra* Todrig. ---- In an improbation of an execution, where the messenger and one of three witnesses did abide by the same, and the other two refused; the writ was improbated. Colvil, March 1587, Hamilton *contra* Ld. Craigie-Wallace. ---- Dead witnesses were found to approbate *presumptive*, until the evident be otherwise improbated indirectly; but where there were several dead witnesses, yet there being also a sufficient number of living ones, the Lords found, That the writ might be directly approbated or improbated by them; and there being but one with the notary who approbated, it was found that a greater number will improbate. Haddington, March 1594, Lord Newbottle *contra* Symson. ---- Found, That an execution made no faith where the messenger was dead, and one of the two witnesses affirmed, and the other denied. Hope, (*Improbation*) 14th March 1611, Butter *contra* Forbes. ---- One of two witnesses to a discharge being uncertain whether it was his hand-writ or not, and the other positively improbating; but it being made out there was another man of the same name and designation, the Lords refused to find the writ false, seeing no writings were produced of that third party to prove that the subscription could not be his. Gosford, 23d June 1675, Tennent *contra* Tennent. ---- In an improbation of a writ that had been signed for the granter by four witnesses and two notaries, one of which witnesses being examined, deny'd his subscription, and another deponed *non memini*; and it being objected against the third, that now he had succeeded in right of blood to the granter of the writ, and therefore could not be examined, since the gaining of the whole plea (which was the case here) was a sufficient temptation to him to deny his subscription; the Lords, in this extraordinary case, proceeded with all the wariness and circumspection imaginable, and allowed him to be received *cum nota*, but declared they would examine him in their own presence; and by the testimonies already taken, they thought that the writ might be found null and not probative, tho' it would not amount to falsehood. Fountainhall, 14th July 1708, Scot *contra* Donaldson. ---- The Lords sustained an execution, the messenger and one of the witnesses insert, and some not designed by name being positive, albeit some of the witnesses insert deponed *non memini*, and the execution was not ancient. ---- Marcus, (*Inhibitions*) January 1684, Sir Robert Murray of Abercairny *contra* . ---- A case of the direct manner of improbation, in which were many articles for and against the deeds. Stair, 11th July 1662, Renton of Lamberton *contra* Earl Leven. ---- Of three witnesses to a bond one was dead,

Proved or not proved.

dead, and therefore probative; a second deponed positively, That the subscription was his hand-writ, but as to seeing the granter subscribe, or being desired to be witness, remembered not; and as there were several persons condescended on of the same name and designation with the third witness, some of them were dead, and others being examined denied. With regard to the second witness, it was argued, that he proved not, for the question was not, whether he subscribed the bond, but whether the alledged granter subscribed it. Answered, Tho' *non memini* proves nothing, where a witness subscribes not, a subscribing witness does necessarily prove, because the subscription of witnesses is purposely introduced to supply the memory of a transient act, that of seeing the principal subscribe, or being desired himself to subscribe, which may be easily forgot, and therefore, where a witness acknowledges his subscription, it does infer he had a warrant to subscribe as witness, unless he deponed positively that he subscribed without warrant: And as to the third witness, it is enough for the creditor that there was another person at the date of the bond, of the name and designation mentioned in the bond, different from any of these who have deponed; the Lords, tho' there were indirect articles offered against the bond, resolving mostly into the improbability of the deed, and the long taciturnity, found the exception of improbation not proved, and sustained the bond. Stair, 7th February 1672, Stewart *contra* Kirkhill, and 19th December 1672, M'Kenzie *contra* Stewart. — There being two witnesses to a disposition, one of them acknowledged his subscription, the other, whose subscription had only the initial letter of his christian name, deny'd his subscription, adding this for the reason, "That he never was in the custom of subscribing in that manner;" but his deposition being most distinctly redargued by production of many writings subscribed by him after that manner, the Lords found the writ in question probative. Stair, 9th July 1678, Henderson *contra* Monteith.

In an improbation, the pursuer insisting in the indirect manner, it appeared that the bond was of an old date, and nothing done upon it till after the alledged creditor's death. 2do, By ocular inspection, the body of the bond, the pursuer's alledged subscription and that of one of the witnesses was the same hand-writ. 3tio, By several testimonies and certificates it did appear there could be no such persons as those mentioned to be the writer and witnesses in the bond; the Lords declared the bond to make no faith; but if the defender (who was heir to the alledged creditor) would instruct the bond, by proving the onerous cause, which was mentioned to be a debt due after compt and reckoning, or would instruct there were such witnesses as these designed in the bond, they would receive the same; but the Lords did not refer the matter to the court of justiciary, not having found who was the forger; and the defender had a probable ground of ignorance for abiding by the same. Stair, 5th June 1672, Anderson *contra* Johnston. — In a reduction and improbation of a discharge, where both the direct and indirect manner was made use of; the Lords found the deed null and improbable, but that the probation was not sufficient to infer a forgery against the user of the same. Stair, 20th February

Proved or not proved.

February 1673, Commissar of Glasgow *contra* Nimmo. — In an improbation of an assignation, it appeared from the writ itself, that it was of a false date, a decret being conveyed therein, which was not obtained for some time thereafter; the Lords found, That the assignation quarrelled, bearing a date inconsistent with its own tenor, and there being no proof that it was subscribed of a date prior to an arrestment, that had been laid on by the pursuer of the improbation, but adminicles and evidences that it was made up *ex post facto*, therefore they did improbate the same, but found not the singular successor user thereof accessory to the forgery. Stair, 7th January 1674, M'Math *contra* Oliphant. — The Lords sustained indirect articles of improbation, notwithstanding the direct were extant, and that the witnesses insert had abiden by and approbated; and upon the probation of the indirect articles, their Lordships did find the witnesses who had been examined in Ireland, false and feigned; but the speciality in this case was, That the witnesses themselves were dead, and not examined before the Lords of session here, or by their commission, but only the extracts of their depositions, taken in a civil pursuit before the high court of chancery in Ireland, sent over here; and the witnesses were *viles personæ*, and of no fame: But in regard it did not appear the defender had any accession to the forgery, being only user of the forged deed, the Lords refused to remit him to the court of justiciary. Falconer, 14th February 1683, Murray *contra* Murray. — In an improbation of a bond by the indirect manner, the direct having perished, upon the following articles, 1^{mo}, That the bond was of an old date, and the creditor, in low circumstances, had made no demand, tho' the alledged debtor was both *volens & valens* to pay. 2^{do}, That the alledged debtor had sign'd another paper, of the date of the bond, about 17 miles distant, only it was in July. 3^{tio}, That there appeared a diversity betwixt the subscription at the bond, and the granter's subscription in other deeds. 4^{to}, That the subscription of one of the witnesses seemed to be vitiated; the Lords, tho' they had some jealousy of the bond, found, That the above qualifications did not amount to a full proof, and therefore repelled the articles of improbation, and sustained the bond. Fountainhall, 19th February 1706, Earl Eglington *contra* Durham.

A BLENCH holding was found not relevant to be proved by retours, but only by charter and sasine. Sinclair, 16th June 1543, King's Advocate *contra* Ld. Houston. Holding how proved?

THE Lords sustained a relict's process upon her contract of marriage, *licet matrimonium nunquam fuerat in facie ecclesiæ celebratum*. Hope, (Husband and Wife) 5th July 1611, Barclay *contra* Napier. — The Lords found it sufficient to entitle a woman to her terce of a deceased man's lands, that the defunct had owned his being married to her in his letter to a third party, and left and bequeathed a certain sum by testament to her therein designed his spouse; the letter and testament being holograph, tho' wanting place, date and witnesses. Forbes's MS. 23d February 1714, Anderson *contra* Wisheart. Marriage.

Proved or not proved.

PROMISE of marriage how relevant to be proved? See it under the article Naked Promise.

Minority.

IN a probation of a person's minority, the Lords found, That a testimonial from the keeper of the kirk-session books could not prove, because neither was this register of such authority, That an extract thence ought to make faith *per se*; much less could it prove minority, because the proving the time of the baptism, does not necessarily infer the time of the birth. Durie, 3d March 1626, Wilton *contra* Aitken. --- An extract out of the kirk-session books is not a sufficient probation of age to infer reduction *ex capite minorennitatis*, but the case being *difficilis probationis* after a considerable time, they found, That *aliqualis probatio* ought to be received with the adminicle aforesaid. Dirleton, 4th June 1667, Thomson *contra* Stevenson.

Payment
and extinction.

IN a pursuit for payment of a bond, upon the back of which there was a *notandum* in the creditor's hand-writing, bearing he had got payment of a part, this *notandum*, tho' delete, when produced in process, joined with another circumstance, that the debtor had granted a second bond for a greater sum, was found a good evidence of the partial payment, it being presumed, that it was partly the onerous cause of the second bond. Durie, 29th July 1624, Norcat *contra* Home. --- A bond of 5000 merks was taken away on these presumptions, That thereafter the debtor granted another bond of 10000 merks to the same creditor who was his advocate and trustee, and therefore the easier to be presumed, that the first bond, being included in the last, might be neglected to be gotten up; that the debtor decaying in his fortune, the creditor apprised his land upon the last bond and not upon the first, which he might have done with the same expence; that he never moved any claim upon it all his life, by the space of 26 years; that in the inventory of his testament he made no mention of it, and that his executors being examined *ex officio*, did acknowledge that they found it amongst the old neglected papers. Stair, 16th January 1667, Ld. of Polwarth *contra* Ld. Halyburton. --- In a pursuit for payment of a bond at the instance of the creditor's representatives, the defender alledged partial payments, by bills drawn upon him by the creditor, and which were accordingly paid, to vouch which, he produced the creditor's missive letters acknowledging the fact. Answered, The bills not remaining in the possession of the debtor, the presumption must ly, that they were delivered up to the creditor, and hit off upon some separate ground of debt; and *de facto* it appeared from the creditor's compt-book, who was a merchant, that the defender was charged with several other articles, for payment of which he got credit for the very articles in question. The Lords found the missive letters, relative to the bills, had no effect, unless the bills were produced. Stair, 20th July 1670, Executors of Hamilton *contra* Executors of Reid. --- Payment of a bond was sustained upon most pregnant presumptions, which were not offered to be taken off, only it was pleaded, that a formal deed cannot be taken away but by writ or oath. Stair, 7th February 1672, Stark *contra* Napier. --- The Lords presumed a bond paid.

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Proved or not proved.

1mo, From the creditors taciturnity 38 years. 2do, The debtor's solvency and the creditor's indigence. 3tio, A proof by witnesses, that there had been a missive letter importing a discharge in the defender's charter-chest, tho' now lost, also that the debtor had paid money to the creditor equivalent to the sum contained in the bond, and that the creditor had been heard to acknowledge, he had got payment. Falconer, 15th December 1681, Mercer *contra* Aldie.----- A debtor endeavouring to prove a bond, dated in the 1662, was paid upon these presumptions, 1mo, That shortly thereafter, the creditor, by a letter, craved the debtor's delay for a sum he owed him, which he had no occasion to do had he been creditor in the bond in question, which was for a greater sum, 2do, That the debtor sold to the creditor a piece of land after the bond, and it was presumable the sum in the bond was retained in the first end of the price, 3tio, That by a diary exactly kept, the debtor had marked this bond as in that manner satisfied, besides that there had been a long silence; yet the Lords found the presumptions, tho' pregnant, not sufficient to take away the bond, and thought it safest not to use too much arbitrariness in disposing upon the lieges rights. Fountainhall, 7th July 1697, Houston *contra* Houston. ---- Partial payments marked upon the foot of an accepted bill of exchange in the creditor's hand-writ, were sustained in a process at the instance of the creditor's heir, to assilzie the acceptor, except as to the balance, in respect he offered to prove by witnesses, that payments were truly made conform to the said jottings, and the bill was still in the custody of the pursuer. Forbes, 9th February 1709, Watson *contra* Smith. --- A bill with a receipt of the contents, written and subscribed by the creditor therein, found among his papers after his death, was found not sufficient to exoner the debtor; because law presumes, that such a receipt is written *spe numerandæ pecuniæ*, and that payment was never made, seeing the bill with the receipt was undelivered. Forbes, 16th July 1709, Cochran *contra* Pringle. --- A bond for 17800 merks, bearing annual-rent, blank in the creditor's name, dated in the year 1670, in the possession of one who was said to have found it among his mother-in-law's papers in the 1689, when she died, was reduced and declared extinct and void at the instance of the granter's heir, upon the following qualifications proved. 1mo, Taciturnity for 39 years, tho' the creditor was poor, and the debtor in good condition. 2do, The alleged finder of the bond concealed it for about 18 years after his mother-in-law's decease, till it was forced into light by the present process of reduction, tho' the debtor's heir falling wrong in his circumstances, there was a ranking of his creditors, and sale of his estate; in which processes it would have been produced, had it been a just debt. 3tio, The defender himself was factor upon that estate, and decerned for a great balance to the present pursuer, which he and his cautioners paid, and yet no offer of compensation. 4to, The defender was trustee and manager for the debtor's former heir, a person of great facility and weakness; and after his death possessed the house where the charter-chest stood, and several papers were afterwards found to be amissing, so that he had abundant opportunity to have got his hands upon this bond, as it may be supposed to have been retired by the debtor, or

Proved or not proved.

never out of his possession. 5to, He used other writs belonging to the family to the prejudice thereof; and, with regard to the present bond, threatened, it should not be the last blank bond he would attack them with. Forbes, 3d July 1713, Cochran of Kilmaronock *contra* Houston.

Possession.

IN a constitution of thirlage there was an old decret, *anno* 1569, against the tenants, possession was proved for 28 years backward, no body being found of age enough to prove further back; the Lords found, That the probation during memory did presume anterior possession to complete prescription. Stair, 24th June 1665, Montgomery *contra* Wallace. — A party having instructed a 40 years progress of heretable rights of property to a tenement of land from his author in the year 1620, and possession since the year 1688; the Lords presumed his possession *retro* to the said year 1620, unless possession by another within the years of prescription or interruption were proved. Forbes's MS. 12th February 1714, Ker *contra* Inglis.

Property of
moveables.

IN a *rei vindicatio* of moveables, it is not sufficient to prove the pursuer's property, unless he prove further *quomodo desit possidere*, because writ not being necessary to the transmission of moveables, possession presumes the defender has acquired the same by some lawful title. Stair, 27th January 1665, Scot *contra* Sir John Fletcher. Stair, 3d February 1672, Scot *contra* Eliot. Stair, 17th January 1678, Geddes *contra* Geddes. See Durie, 14th December 1626, Mitchel *contra* Ld. Caprington. Spotiswood, (*Probation*) 27th November 1629, Paterfon *contra* Edward; where the defence was repelled, That the presumption of property from possession cannot be redargued but by writ or oath, and the pursuer was allowed to prove his property *prout de jure*. — The Lords found an heir or executor entitled to pursue a *rei vindicatio* of moveables that were in the possession of the predecessor when he died; which, being proved, the defender must be decerned to restore, unless he can prove that he acquired the same by a valid title. Gosford, 16th February 1670, Inglis *contra* Inglis.

Property of
land.

IN mutual declarators of property, both parties proved their libel, whence the Lords inferred a commonalty. Stair, 13th June 1668, Gibson *contra* Oswald.

FOUND, That the act 138, parl. 1592, declaring *new bounding infestments shall not prejudice any person anent their meiths and marches*, relates only to bounding infestments, proceeding upon the vassal's own resignation in favours of himself, but not where the resignation is in favours of another, in which it is not so presumable the disponent, who is bound in warrandice, will make a false bounding, or dispoise what he has no right to; and therefore, in a competition about the property of land, which both had possessed, but neither uninterruptedly, to be a ground of prescription; the Lords preferred him to whom a bounding charter was granted as the title of his purchase, including the lands in dispute, tho' the other brought a proof that it was ever habite and repute as part and pertinent of his lands. Fountainhall, Dalrym-

Proved or not proved.

Dalrymple, 5th December 1701, and 8th January 1702, Lord Tillicultry *contra* Murray of Abercairny.

IN a cognition of marches, a piece of ground being disputed, to which both parties claimed right as part and pertinent; six of the inquest voted the ground to be a common property, eight were *non liquet*, and the chancellor did not vote, because there was no equality; the cause being advocated to the Lords, because the sheriff refused to give out the decret: It was found, That the verdict of the inquest, where there was so much dubiety, ought not to be rested upon; and the Lords declared they would advise the probation led before the sheriff, and, that the matter might be fully cleared, allowed five witnesses more to either party to be adduced before themselves. Stair, 21st July 1675, Chiefly *contra* Baillie.

FOUND, That *in re antiqua*, viz. 120 years back, the superior's *Propinquity*, *fasine*, naming a man, son and apparent heir to another, was a sufficient proof, even *contra tertium*, to prove the propinquity, in order to give him right to a reversion of lands, whereof that third party was wadsetter. Maitland, 7th April 1567, Halyburton *contra* Ld. Halton.

A TACK not relevant to prove the rent of lands, without proving *Rent of lands*, possession and payment conform. Forbes, 20th July 1708, Nicol *contra* Park.

A DONATAR making faith at the passing of the gift, that it was *Simulation*, to his own behoof, no witnesses were thereafter admitted against him, nor other presumptive evidence that the gift was simulate. Stair, Gofford, 4th December 1669, Jeffray *contra* Jeffray.

FOUND presumed from several circumstances against the executors *Trust before act 1696*, of a defunct, That a certain sum contained in the testament was not the defunct's, but in his name for another's behoof. Stair, 12th January 1666, Executors of Stevenson *contra* Crawford. --- In a reduction, by a relict, of an assignation, made by her to her brother-in-law, on this ground, That it was for the behoof of her husband, and the defender his brother's name borrowed, because the husband could not consent in favours of himself, and so revocable as *donatio inter virum & uxorem*; the Lords *ex officio* having taken the defender's oath, he depone, That he got the assignation sent him from his brother some years before his death, in security of a L. 1000 due to him by his brother; the circumstances inferring the trust were, *1mo*, That the assignation was *omnium bonorum*, without reservation of liferent or aliment, granted at a time when the pursuer was in imminent danger of death; and it was extreme improbable she would have made such right in favours of a stranger. *2do*, The husband did uplift of his wife's effects, after the assignation, above 20000 merks, and the defender was a subscribing witness to many of the discharges, without once offering to interpose. *3tio*, The defender did not alledge he got the assignation from the pursuer, or from any person impowered by her to make delivery; and so it was never a truly delivered evident. The defender answered,

Proved or not proved.

answered, He forebore to make use of his assignation, because, his brother having no children, he expected to be his heir, and was unwilling to cross him. The Lords found the evidences of trust relevant and proved, and found the assignation revocable, unless the defender should instruct he was creditor to his brother at the date of the assignation. Stair, 22d January 1673, Watson *contra* Bruce. --- Trust found proved upon most pregnant circumstances, against which little was objected, save that writ could not be taken away by presumptions. Stair, 22d February 1665, Viscount of Kingston *contra* Fullerton. --- It being alledged, That a bond in the creditor's hand was in trust for behoof of another; the Lords found this relevant to be proved by the creditor's oath, but not by the oath of the debtor, or other witnesses. Fountainhall, 5th February 1678, Cleland *contra* M'Donald.

Trust after
act 1696.

A DEBITOR having given his creditor assignation to some bonds in security, and having taken his backbond to accompt for the superplus; and thereafter several partial payments being made, and the backbond being given back to be renewed for the sum yet resting, and the receiver with his own hand jotting on the back thereof, that he had got it, because there were several things to be altered therein, and a new backbond to be formed; but he dying before this was done, and that note on the back being unsubscribed, this being after the act of parl. 1696, declaring trust only relevant to be proved *scripto vel juramento*; the Lords found the said unsubscribed scroll not probative of the trust, without prejudice to the debtor to extinguish his bond, by proving, that the creditor got payment by the debts assigned him. Fountainhall, 9th December 1708, Watson *contra* Forrester. --- A person having been in use to borrow money out of the bank, by drawing bills upon his debtors in the ordinary stile of bank bills, payable to his own domestick servant, only for form's sake, that, by his indorsing them to the treasurer of the bank, the drawer might receive the value; and one of these draughts proving ineffectual through the not acceptance of him upon whom it was drawn, so that it could not be transacted in the bank, where no unaccepted bills are negotiated; and being found unindorsed, in the custody of the servant at his death, who had not mentioned it in a disposition made by him of all his effects, where the particulars specified were of far less value; the Lords found, That it was drawn for the master's own behoof, without necessity for his executors to prove in the terms of the act of parl. 1696, that the possessor was trustee. Forbes, 8th February 1710, M'Claren *contra* Executors of Chiesly.

TRUST in moveables falls not under the act 1696, and is therefore relevant to be proved by witnesses. December 1731, Lord Strathnaver *contra* M'Beath.

Acceptance
of tutory.

A WRIT subscribed by a tutor, designing him so, makes him as fully liable, as if there were a nomination or a gift of tutory produced. Gosford, 2d December 1668, Seton *contra* Seton. --- A tutor's acceptance found proved, by his subscribing inventaries of the pupil's means, and judicially producing them by a procurator. Forbes, 28th January 1714, Watson *contra* Watson.

WRIT

WRIT defective in solemnities, if relevant to be supported by proof? See *Writ*.

PROOF of death-bed. See *Death-bed*.

PROOF of rebrotator. See *Process*.

PROOF of tenor. See *Tenor*.

INSUFFICIENCY or latent vitium of goods purchased, how relevant to be proved? See *Sale*.

EXTRACT in what case probative against a challenge of false and forged. See *Improbation*.

PROPERTY.

HOW far one may use his property to the detriment of his neighbour, debated betwixt the mayor of Berwick and Laird of Haining, but no relevancy found. Stair, 1st July 1661.

No reparation found due to the proprietor of an inferior tenement, for damage occasioned by the falling of stones and rubbish in hightning the walls of a superior tenement, the damage arising from the nature and situation of the inferior tenement. Falconer, 15th December 1681, Deans *contra* Abercrombie. — An heretor of an inferior tenement, proposing to carry up a vent in his gavel, and before it reached the superior tenement to break a hole through the wall, and carry it up on the outside; the Lords found the inferior tenement liable in the servitude *oneris ferendi* to the superior; and therefore that this work ought not to be allowed, if it any way weaken the wall. Fountainhall, 14th December 1698, Hall *contra* Corbet.

ACTION sustained for restoring a march burn to its former chanel, from which it was drawn for some space to serve a mill, tho' the pursuer could qualify no immediate prejudice through want of it, other than *amenitas* or trouting. Durie, 25th June 1624, Bannantine *contra* Cranston. — The Lords will allow an heretor to build a dam-dyke upon a river, for gathering the water to his mill, provided both ends of the dam-dyke be made to rest on his own ground, and it be so built, as not to divert the water that comes over it, or goes from his mill, to return to the former chanel, and go to another heretor's mill below. Forbes's MS. 1st. 22d November 1713, Cuninghame *contra* Kennedy. — A small stripe coming off from the main body of a river, about a mile above where it enters the sea, did gradually increase till it became a branch of the river, upwards of 60 foot over; as this branch was daily incroaching upon the neighbouring ground, the proprietor was advised to build a bulwark 30 foot into the chanel, to throw that branch of the river into its former chanel, or at least to confine it within bounds: This was opposed by the heretor whose lands lay on the opposite side of the river, for whom it was admitted, that a proprietor

may *munire ripam*, face up and defend his banks from the incroachments of the water ; but that he cannot alter its course, to throw it upon his neighbour's ground. Answered, Betwixt the branch in question and the main body of the river, there is three quarters of a mile of waste ground, and the bulwark can have no other effect, than to remove the chanel a little nearer the main river, as the branch in question did run a few years before. The Lords found, That the proprietor, for defence of his grounds, had right to build the bulwark projecting into the chanel of the river, not exceeding 30 foot, upon his giving bond with a cautioner, acted in the books of session, to indemnify his party from all damages which shall arise to his land on the opposite side of the river, by occasion of building the said bulwark, at any time within ten years after completing of the same. 12th February 1735, Duke Gordon *contra* Duff of Bracco.

THE river of Nairn, which runs into the sea through the property of the town of Nairn, and at the mouth of which the town had a stell fishing, having, upon a sudden speat, changed its course, and made a new chanel for itself through the Lord Lyon's lands, the point of right came to be tried before the Lords, whether the town of Nairn had right, by means of a bulwark, built within their own ground, to bring back the river to its former chanel ; It was argued, That a publick river, having, of itself, changed its course, it cannot be brought back by any party pretending prejudice by the change, because such river is not the private property of any person. In answer, The case was figured of a harbour deserted by a river ; but then a harbour is a private property, and he who has right to the end has right to the means. Upon a division it carried, That the town of Nairn had right to build the bulwark. 28th July 1738, Town of Nairn *contra* Brodie Lord Lyon.

THE Lords found, That a neighbour may build a bridge over a ford become impassible, and may fasten it on the other side upon another man's ground. Nicolson, (*Servitude*) 19th January 1619, Cleland *contra* Cleland.

IN a declarator of servitude, the Lords found, That, altho' both parties rights proceeded from the same author, yet seeing the defender's tenement was not liable in any servitude to the other, he might lawfully build *ad cælum usque*, even tho' it should stop all the pursuer's lights. Hope, (*Servitude*) 10th March 1613, Somervell *contra* Somervell.— A party having taken down an old tenement in Edinburgh, which had a wooden fore-stair, and which he was re-edefying of lath and plaister, and attempting to carry it so up to the top, seven stories high, tho' the fore-stair was not so high before ; and this being opposed by the neighbouring heretors, because it hurt their lights, &c. and he alledging, That the act of privy council 1675, allows such fore-stairs to be rebuilt of the same extent as formerly, *i. e.* no broader nor wider, but provides nothing against the heightning thereof ; yet the Lords found, tho' the neighbours had no servitude *altius non tollendi*, That he could not make this fore-stair higher than it was formerly. Fountainhall, 2d February 1688, Wilson *contra* Richardson.

PROPERTY of land-rights how transferred. See *Infeftment*.

PROVISION

PROVISION to Heirs and Children.

AN heretable bond being conceived to husband and wife in conjunct-fee, and after their decease to the children of the marriage, all the children male and female, jointly and equally, must be served heirs of provision to their father; for by *children* is not to be understood the heir of the marriage only. Stair, 17th February 1663, Hay *contra* Morison.—Provision to the children to be procreated of a marriage of certain urban tenements, found to go to all the children equally, whether male or female. Stair, 13th February 1677, Carnegy *contra* Clark. Stair, 10th July 1677, Carnegy *contra* Smith. — The same where it is expressed to the heirs or children. Stair, Fountainhall, 29th January 1678, Stewart *contra* Stewart. — A father, in a contract of marriage, providing his estate to the children of the marriage, and there being a son and a daughter; the Lords found, That the sister might serve herself joint heir of provision with her brother, since the provision was to children in the plural number. Fountainhall, 11th January 1678, Kinloch *contra* Kinloch. — By contract of marriage, the lands being provided to the heir by the first clause, and the conquest to the children in a subsequent clause; the Lords found the heir had a share of the conquest (tho' it was most part executry) without collation, because he was also a child. Fountainhall, 21st July 1680, Brown *contra* his Mother. — One being obliged in his second contract of marriage to provide L. 20000 upon land, to himself and his wife in liferent, and to the heirs of the marriage in fee, with a quality, that the sum should be proportioned among the children at his sight; and by the infestment upon the said contract the fee is provided to the heirs and children: The eldest son pretended to be heir of the whole sum as the heir of provision. Answered for the younger children, That heirs, in a second contract of marriage, are understood children in a competition among themselves. 2do, The clauses in the contract, reserving power to the father to divide the sum, and in the infestment, to heirs and children, demonstrated the father's meaning; and the provision to heirs was rational, that the children might represent the father, and be liable to pay his debt. 3tio, The eldest brother being now general heir upon the decease of the children of the first marriage, he ought to have no share of the L. 20000. The Lords found, That the children must represent their father, and that the sum divided among them *per capita*, the father having made no division in his life, and that the eldest son had one share thereof and no more. Marcus, (*Contracts of Marriage*) February 1684, Scot *contra* Scot. — A woman in her contract of marriage being obliged to convey to her husband what lands should happen to fall to her during the marriage, and he being obliged to take the rights and securities thereof to himself and her in conjunct-fee, and to the heirs and children in fee; the children pursued the mother to denude in terms of the provision; it was alledged for the defender, That the clause being copulative in favours of heirs and children, the pursuers must serve heir to their father, tho' the provision would divide amongst them *pro rata*; which the Lords sustained, tho' it was replied, That often times conjunctive particles are to be interpreted disjunctive. Marcus, (*Contracts of Marriage*) December 1684, Irvine *contra* McKitterick

In provisions to the issue of a marriage, whether the children succeed *per capita*, or if the heir is preferred.

Kitterick her mother. — A sum of money provided to the heirs of the marriage, found to divide amongst all the children equally; the sum being small, and they not otherwise provided. Home, February 1727, M'Dowal *contra* M'Dowal.

Import of a provision to be a bairn in the house.

A DAUGHTER, by her contract of marriage, being provided to be a bairn in the house at her father and mother's decease, this was found to comprehend not only her portion natural, but also her share of the dead's part, he having died intestate, altho' the other children, who were still *in familia* at their father's decease, alledged, That they being the only executors had sole right to the dead's part. Durie, 8th February 1622, Finlayson *contra* Veitch. — A bond being granted by a man to his daughter after her marriage, bearing, That she should have as much of his gear at his death as his other children; the Lords found, That this bond did bind another child left executor, altho' he was assigned to a bond by his father, inhibition being served by the daughter before the assignation. Nicolson, (*Bairn in the house*) 14th February 1619, M'Math *contra* M'Aulay. — A man binding himself in his daughter's contract of marriage, That at his death she should have an equal portion of his goods with other two daughters, these two daughters dying before their father, and other two daughters being thereafter begotten by him; in a process at the married daughter's instance against these last two, the Lords allowed her still to come in with them *pro rata*, altho' it was alledged, That by the death of the two former, who were expressly named in the contract, this clause was evacuated, and could take no place against the defenders, who were not then *in rerum natura*, nor was it provided in the contract, that the pursuer should succeed equally with them. Spotiswood, (*Testament*) 18th February 1631, Corfan *contra* Corfans. — In the same cause, upon an alledgeance, that both the deceased daughters were forisfamiated before their death; and that therefore, as they could have no share with the defenders if alive, so no more could the pursuer; the Lords repelled this defence, because the meaning of the defunct was thought to be, That the pursuer should be a bairn in his house if she were alive at his decease. Spotiswood, *ibid.* — A father having provided his eldest daughter, in her contract of marriage, to 3000 merks, and also obliged himself that she and her children should succeed to a share of his estate and goods with the rest of his children, did, at the time of his decease, after the rest of his children were also provided, dispoise to his eldest son, by a lucrative deed in *liege poustie*, his estate, consisting of bonds and goods, which disposition was quarrelled by the daughter's children, as made in defraud of the obligation in their mother's contract of marriage; it was alledged for the defender, That the obligation imported only, That the daughter was not cut off from her legitim, and the father may, at any time in his *liege poustie*, dispoise of his moveables, even *titulo lucrativo*, without regard to the legitim, tho' he could not prejudge it by a testamentary deed. Answered, The obligation imports more than a reservation of the legal provision of the legitim or third; for the later implies the condition, if the defunct have goods the time of his decease, whereas by the obligation, in prospect whereof the husband gave his wife a suitable jointure, the wife and her children of the marriage are creditors, and the contract is onerous, nor is the clause conceived

ceived thus *without prejudice*, &c. but thus *I oblige me*, &c. the Lords inclined to prefer the children, in respect of the obligation. Marcus, (*Contracts of Marriage*) March 1686, Irvine *contra* Crawford. --- Jane Beg, in her contract of marriage, being provided to a certain sum in name of tocher, in satisfaction of legitim, &c. with this provision, "That she should be a bairn in the house at his decease, with the rest of his daughters, but not in the least with his sons;" the Lords found, That the sons have right to the same share of legitim, as if Jane had not existed the time of the father's decease; and in respect that Jane is only provided to be a bairn in the house with the rest of the daughters, and that the father could not, nor hath not by any clause in the contract, prejudged the daughters as to their legal share in the legitim; found, That each of the daughters, excepting Jane, must have an equal share in the whole legitim, according to the division of law among the whole children, including Jane; and therefore found, That after deducing the shares of the sons as if Jane had not existed, and after allowing to each of the other daughters such share as should belong to her according to the division of law, taking in Jane as a bairn of the house, the remainder of the legitim belongs to Jane and no more. 18th November 1737, Jane Beg *contra* Jane Lapraick.

A FATHER having obliged himself in his eldest son's contract of marriage to give him 1000 merks, and also, "to make him equal sharer in all goods, sums of money, heretages, and others pertaining to him the time of his decease, whereby one of his children should not have more of his estate than another;" and having afterwards, in his second son's contract of marriage, provided the greatest part of his means to him, the Lords found, the father might provide the second son to a competent provision effecting to his estate, but not exorbitantly to disappoint the obligation. Marcus, (*Contracts of Marriage*) February 1683, *contra* . --- A man in his daughter's contract of marriage, among other provisions bound himself, That failing heirs-male of his body she should be heir portioner with the other daughters; thereafter there being no other children, he provided his estate to his daughter in liferent, and her heirs in fee, excluding expressly her husband's *jus mariti*. This was quarrelled by the husband, as in defraud of the obligation the granter came under in the contract of marriage, whereby there was a *jus quæsitum* to him. Answered for the wife, The provision in question was personal to her, not with a view to the husband's interest, who got a good portion with his wife; and it was no such strict obligation as to bar the father from doing rational deeds exclusive of the wife herself, far more of her husband. The Lords found, the father might qualify the right to his daughter exclusive of the *jus mariti*. Bruce, 4th February 1715. Brown *contra* Pile her husband.

A HUSBAND in his second contract of marriage, obliged himself and the heirs of the first marriage, which failing, his heirs and executors, to pay to his children of the second marriage 4000 merks: The heirs of the first marriage failed; there were two children of the second marriage, whereof one was heir to the defunct; in this case the heir, tho' a child of the second marriage, was excluded from any

share of the 4000 merks. Here the heir of the first marriage was never served heir. Stair, 17th January 1665, Edgar *contra* Edgar. Newbyth observes it as of 13th January 1665; but the contrary seems thereafter to have been found betwixt the same parties, Newbyth, 1st July 1665, *inter eosdem*. ---- In a contract of marriage the husband bound himself to provide 20000 merks to the children beside the heir: There being only two daughters of the marriage, they offered to renounce, and take themselves to this provision as children; which was not sustained, because there were not children beside the heir. Stair, 6th January 1670, and 20th December 1671, Boyds *contra* Boyd.

Husband being bound in a contract of marriage to provide the issue of the marriage, the heir or children, as creditors, may insist for implement without a service.

IN a process at the instance of the heir-male of a second marriage, against his father's representatives, for implementing the provisions in the contract of marriage in favours of the pursuer as heir-male, the defender quarrelling the pursuer's title for want of a service, and the pursuer offering to serve heir-male of the marriage *cum processu*; the Lords sustained process, the pursuer producing a retour *cum processu*. Stair, 21st July 1676, Hay *contra* Earl Tweddale. ---- One in his contract of marriage being bound to secure a certain sum to himself and wife in conjunct-fee, and to the heirs of the marriage, and being pursued by his eldest son for implement, objected, No process, because the pursuer is only presumptive heir; for no man can have an heir while he is alive, and if the pursuer should die before his father, he never will be heir of the marriage; answered, Tho' the pursuer cannot qualify himself heir, yet *qua* presumptive heir, he has a legal interest to see the obligation implemented in terms of the contract. The Lords sustained process. Stair, 13th February 1677, Frazer *contra* Frazer. ---- The contrary had been found. Dirleton, Stair, 7th January 1675. Innes *contra* Innes. Durie, 18th January 1622, Ld. Silverstonhill *contra* his father. ---- In the like case, the pursuit being at the instance of an only child of the marriage after her mother's decease, the Lords sustained process against the father, but would not oblige him to implement to the pursuer *nominatim*, but only to the heirs of the marriage in terms of his obligation. Marcus, (*Contracts of marriage*) March 1684, Panton *contra* Irvine. Fountainhall, 31st January 1705, Cairns *contra* Cairns.

ONE having become bound in his contract of marriage to lay out a certain sum to himself and spouse in liferent, and to the children of the marriage in fee, the children, without the necessity of a service, were found entitled to pursue their father's representatives for implement. Newbyth, 13th January 1665, Wallace *contra* Wallace. ---- In a second contract of marriage, the husband being bound to employ 30000 merks at the next term after the marriage, to himself and wife in conjunct-fee, and to the children of the marriage in fee; the children were found entitled to sue for implement against their father's representatives *qua* creditors, without necessity of a service. Marcus, (*Contracts of Marriage*) 28th July 1688, Chalmers *contra* Chalmers.

THE conquest being provided to the heirs and children of a marriage, the Lords, in a pursuit at the instance of the children who were not yet served heirs, sustained process; but before extracting of any decret ordained them to be served heirs. Fountainhall, 28th November 1684, Irvine *contra* M'Kittrick.

THERE

THERE being an obligation in a contract of marriage to provide the conquest to the children of the marriage, the Lords found, That a daughter, the only child of the marriage, had right to the conquest *ipso jure*, tho' she was neither confirmed nor served heir of conquest, and consequently that her husband *jure mariti*, after her death, was entitled to what part of the conquest was moveable. Fountainhall, 7th December 1697, Cuming *contra* Kennedy. — A father, in his contract of marriage with a second wife, having obliged himself to secure the children of that marriage in a certain sum, and three of these surviving the father, but two of the three dying thereafter in pupillarity, without being served heirs of provision, so that the only surviving child of that marriage, a daughter, serving herself heir of provision to her father, and pursuing the heir of the first marriage for the whole sum; and the heir alledging, That she had only title in her own right to the third thereof, and that she behoved to make up titles to the other two; the Lords found, That the pursuer being the only child in life of the second marriage, and the other children deceasing, not having been served heirs of that marriage, she had thereby the sole right to pursue for implement of the provision in the contract. Bruce's MS. 27th December 1716, and 23d January 1717, M'Intosh *contra* Ld. Aberarder. — By contract of marriage, the husband became bound "to employ the sum therein named, and the conquest during the marriage, to himself and spouse in liferent, and to him, for the use and behoof of the children to be procreated betwixt them, in fee; which failing, &c." and there being but one daughter of the marriage, who deceas'd before her father, after conveying her interest as only child of the marriage, a competition arose about the conquest, betwixt her disponent and her son, who took out briefs to serve himself heir of provision in his grandfather's contract of marriage; the Lords found, That the husband being obliged to provide the conquest to himself, for the use and behoof of the children of the marriage in fee, he became thereby a trustee for behoof of his children, and that after dissolution of the marriage, action was competent to the daughter, only child of the marriage, against her father in his own lifetime, for denuding of the trust, and that the same action was competent to her assignee, and therefore found there was no place for her son to serve heir of provision to his grandfather. Home, 4th February 1726, Gibson *contra* Arbuthnot. — A bond of provision being granted to a daughter, and failing of her by decease, to Hugh Monro, *for the use and behoof of his children*, these children, after the decease of the institute, and of their father the trustee, were found entitled to pursue for payment, without necessity of a service; for here there was no substitution established, the subject being directly vested in the trustee after the institute's death; and as he had the *jus exigendi* for the use and behoof of his children, they must have the same after his decease. June 1733, Monroes *contra* Duff of Drummair. — In a second contract of marriage, the husband and his heirs became bound, at the term of Whitsunday after the marriage, to employ a certain sum to himself and wife in conjunct-fee and liferent, and to the heirs and children of the marriage in fee; there was but one child of the marriage, a daughter, who, after assigning the provision to her husband, died, without making up any titles; in a pursuit at the husband's instance against the granter's representatives for

And will
transmit to re-
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their *jus crediti*
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vice.

payment, it was admitted for him, That had the father lent out the covenanted sum in terms of the contract, a service as heir of provision would have been necessary; but while the obligation stands unimplemented, the heirs and bairns are creditors; it is true, when this action is pursued against the father, it can go no further than to oblige him to implement, that is, to lay out the money in terms of the contract; but when the action is laid against his representatives, it resolves into an action for payment, because the father's fee dies with him, whereby the heirs and bairns of the marriage fall into the full right. The Lords sustained process for payment, and found no necessity for a service. 3d February 1732, Campbell *contra* Duncan.

Obligation
by one in his
contract of
marriage to
provide cer-
tain sums or
subjects to the
issue of the
marriage, how
far effectual
in competi-
on with credi-
tors?

ONE being bound in his contract of marriage not to sell, annalzie, &c. or to do any deed to prejudice the heirs of the marriage of their succession to the lands; this was found not to take away *libertatem commercii*, or to bar any rational or onerous deed, but only such gratuitous deeds as were done *eo intuitu*, to disappoint the heirs of the marriage. Haddington, 24th June 1608, Home *contra* French. — In a contract of marriage, the husband being bound to provide 10000 merks to himself and spouse in conjunct fee and liferent, and to the heirs of the marriage in fee; it was found, That such an obligation not being pure and simple to pay a sum, but only to substitute the heirs in the fee of the subject, cannot have a stronger effect, than if the sum were *de facto* lent out in terms of the contract, in which case, the father being fiar of the sum, and the heir only substitute, the sum would be affectable for the father's debts; and therefore it was found, That the heirs of the marriage, upon such an obligation, could not compete with the lawful creditors, whose debts were contracted during the marriage; nor could it alter the case that an inhibition was served upon the contract, the effect of which is to secure the obligation upon which it is founded, not to alter the nature of it. Stair, Dirleton, 24th January 1677, Graham *contra* Rome.

ONE, in his contract of marriage, having become bound to infest his wife in five chalders of victual for the aliment of his younger children, till their age of 14, and having, in implement of this obligation, disposed certain moveables to his wife; in a competition betwixt her, in behalf of the children, and the executors-creditors of the husband, whose debts were contracted after the said disposition, the Lords preferred the creditors, unless the defunct were *solvendo* at the time of his decease. Stair, 3d July 1663, Gordon *contra* Fraser. — In a contract of marriage, a certain subject being provided to the husband and wife, and heirs of the marriage, the husband further became bound to provide 5000 merks to the remanent children of the marriage; this was found not to be a simple obligation to pay 5000 merks to the remanent children, but only to lay out that sum to himself in fee, and, after his decease, to his younger children; and so the obligation having no other tendency than to make them substitutes, it could have no other effect than to bar gratuitous alienations in defraud of the contract, but as the father was to be fiar, his whole onerous debts, at whatever time contracted, behoved to exclude the children, who had no other claim than to be made substitutes. Stair, Dirleton, 24th January 1677, Graham *contra* Rome. — In a contract of marriage, the husband being bound to provide to the heirs female, if there were one

one daughter, 18,000 merks, and, if two, 24,000 merks; the Lords found the only daughter, and child of the marriage, was directly creditor for the sum, and not bound to make up titles by service as heir of the marriage, and this in respect of these words, *If there be one daughter, &c.* but here the estate was tailzied to heirs male by the antient investitures, so that the daughter could not succeed. *Harcus, (Contracts of Marriage) 15th December 1681, Sir William Binning contra Sir William Maxwell of Calderwood.*—One, in his contract of marriage, being obliged “to provide 20,000 to himself in liferent al-
“lenarly, and to the bairns of the marriage in fee, with a provision,
“That they should have right thereto without representing him;” and he not having employed the sum, but contracted debt after the marriage; in a competition betwixt the children and creditors, the Lords found, That the obligation only imported a destination of succession to the children, and that they were not to be looked upon as creditors from the date of the contract, in competition with onerous creditors, but only from the time the diligence was done upon the obligation, and so did not bring in the children *pari passu* with any creditor whose debt was contracted before the childrens diligence, tho’ the childrens adjudication was within year and day, because the obligation, *quoad* the children, being considered as granted of the date of their diligence, was looked upon as *post contractum debitum*, and the father was then bankrupt. *Harcus, (Contracts of Marriage) February, Falconer, Home, 21st November 1682, Creditors of Marjoribanks contra Margaret Marjoribanks*—An obligation in a contract of marriage to provide a certain sum to the children of the marriage, was found not to establish any *jus crediti* in the children, to enable them to compete with their father’s extraneous creditors. *Fountainhall, 24th July 1696, and 17th June 1697, Napier contra Irvine.*—In a competition betwixt a defunct’s children and his creditors, the children of the first marriage having adjudged upon bonds of provision, and the children of the second marriage upon a provision made to them in their mother’s contract of marriage, both prior to the contracting of the debts; yet the Lords preferred the creditors, and refused to bring in the children *pari passu*, tho’ it was alledged that the father was in good condition when these provisions were granted; for the Lords thought it hard to oblige creditors to enquire into the condition of the father when he granted these latent bonds of provision. *Forbes, 23d, Fountainhall, 24th December 1709, the Creditors and Children of Marshall competing.*—One having bound himself, in his contract of marriage, to pay a certain sum *liberis nascituris*, at their age of 18, or marriage, the children were found to be proper creditors, and entitled to compete with the onerous creditors of the father, according to their respective diligences. *Home, 24th January 1724, Lyon contra Creditors of Easter-Ogle.*—An infeftment of annualrent granted by a man to his children therein named, their respective proportions being payable at the first term after his decease, was found preferable according to its date in competition with onerous creditors. 20th January 1731, *Nasmyth contra Brands.*

In a contract of marriage the husband being bound “to infeft
“himself in certain lands and tenements betwixt and a precise day, about
“a year after the marriage, and being so infeft, immediately thereafter
“to resign for new infeftment to his future spouse in liferent, and the

"heirs of the marriage in fee, which failing, &c." with the reservation of his own liferent, and inhibition being raised on this contract; in a purfuit, the eldest son of the marriage against his father, appearance was made for a disponent, whose purchase was after the inhibition, and it was pleaded for him, That this was no other than a destination of succession, that the father remained fiar, and might alienate for onerous causes; the Lords found, That the father being obliged, after his own right was completed, to infect the heirs of the marriage in fee, as soon as they existed, that he could not grant any voluntary right in prejudice of the provision; and therefore that the inhibition was effectual against the disposition in question. Home 22d July 1724, Douglas *contra* Douglas and Drummond. — In a contract of marriage the husband being bound "to provide a certain sum to himself and wife" and the heirs of the marriage, which failing, the one half to her heirs;" and there being no heirs of the marriage, the Lords found, That the father might lawfully contract this sum to a second wife and children, tho' he had over and above provided them to considerable effects, acquired during the first marriage, and that the same was a rational and effectual deed against the first wife's heirs. Stair, 1st and 21st December 1680, Anderson *contra* Bruce. — A man, in his first contract of marriage, "obliging himself to take the securities of a sum of his own, and some lands he got in name of tocher with his wife, to himself and her" in liferent and conjunct-fee, and to the children of the marriage, which failing, the said money and lands to be equally divided betwixt her and "his heirs;" this marriage dissolving without issue, in a competition betwixt an only daughter of the second marriage and the first wife's heirs, the father having provided his whole lands to the heirs of the second marriage, this was found to be a voluntary deed, which could not evacuate the substitution in the first contract in favour of the wife's heirs *quoad* their half. Fountainhall, 19th January 1697, Laws *contra* Tod. — There being a clause in a contract of marriage, obliging the man to resign his estate in favours of himself and the heir male of the marriage; and inhibition being served thereon by the friends, at whose instance execution was appointed to pass, the Lords found, That the clause did disable the man to disponent gratuitously in prejudice of the heir male of the marriage. Forbes, 16th, Fountainhall, 17th July 1708, Home *contra* Home. — A man being bound in his contract of marriage to infect himself and wife in conjunct-fee, and the heirs of the marriage in fee, in certain subjects, but restricting the wife to the liferent of the half in case of children, a discharge of that restriction during the marriage was found not good against the children, as being gratuitous. Stair, 10th July 1677, Carnegie *contra* Smith.

Where the husband is not the granter of the obligation.

A FATHER, in his son's contract of marriage, having obliged himself to pay a certain sum "to him and his spouse in conjunct-fee and liferent, and to the heirs and children of the marriage in fee, which failing, to the son's heirs and assignies whatsoever;" and the son having, after his wife's decease, granted a disposition of the subject; the Lords found, That the granter's daughter and only child of the marriage, was in the common case of an heir of provision, and had interest thereby to quarrel any gratuitous deeds done by her father to her prejudice. Forbes, 15th June 1710, Leslie *contra* Creditors of Leslie. — A man in his contract of marriage obtained lands to be disposed to

to him from his father, *to himself and wife in conjunct-fee and life-rent, and to the heirs whatsoever of the marriage in fee*; in this case it was found, That the husband could do no voluntary or gratuitous deed in prejudice of the heir of the marriage, and particularly that he could not disappoint the heir of the marriage, even by a deed in favour of the second son of the same marriage. November 1717, February 1718, *Fea contra Trail*.

WHEN a father, in implement of his contract of marriage, does *de facto* employ the covenanted sum, and takes the same payable to himself, and after his decease to the heirs or children of the marriage, the sum, as his property, may be affected by his creditors; but then, as the obligation in the contract imports not barely that he is once to settle the sum, but to make it truly effectual to the heirs or children, which implies a prohibition to contract debt, so as to disappoint the heirs or children of their succession; this prohibition is sufficient to bar gratuitous creditors, tho' not onerous creditors, which nothing can do unless an irritant clause be added. Upon this footing it was found, That if the subject be carried away by onerous creditors, an action lies against the father and his cautioner at the instance of his children, for reemploying the sum, or making good the same to them after his decease. 5th December 1734, *Fotheringham contra Fotheringham of Pourie*. ---- The same found. Bruce, 23d January 1717, *M'Intosh contra Ld. Aberarder*. ---- And if a father, as being fiar, do any deed in prejudice of such an obligation, the heir of the marriage may charge him to purge the same, or to reemploy the like sum. Stair, 13th February 1677, *Frazer contra Frazer*. ---- In like manner, a father, who was bound to provide certain subjects to the heir of the marriage, having granted provisions to a second wife and children out of the same funds, the children of the first marriage were found entitled to a relief against their father out of a separate subject afterwards acquired by him. 27th January 1730, *Henderson contra Henderson*.

IN a contract of marriage the husband and his cautioner being bound to employ a sum for the use of the wife in life-rent, and the children of the marriage in fee; and the husband having died bankrupt without implementing, in a process at the instance of the children against the cautioner, the defence was, That the pursuers, as heirs of provision, are ultimately liable to relieve the cautioner, and *frustra petit quod mox est restitutus*. Answered, The pursuers have got nothing by their father, and so cannot be liable for any of his debts; nor will the sum they recover from the defender make them liable for their father's debts, because their claim is not *qua* heirs to their father, but as the defender's creditors. The Lords found the cautioner bound to implement, and that without relief. 5th December 1734, *Fotheringham contra Fotheringham of Pourie*. ---- And the same was found the day thereafter. Rose of Markinch *contra Mackenzie of Applecross*. ---- The like. 6th January 1627, *Stewart contra Campbell Forbes*, 18th, Fountainhall, 19th December 1707, *Dickson of Hartree contra Miln of Carridden*. ---- The contrary had been found. Stair, 23d November 1677, *Crawford contra Kennoway*. Falconer, 9th March 1684, *Bouffie contra Menzies*.

Obligation
to provide the
conquest to the
issue of a mar-
riage, import
of the same
with regard to
the father.

A PROVISION of conquest in a contract of marriage to the heirs, or to the bairns of the marriage, is not so strictly to be interpreted as if the father were under a specifick obligation to make every subject effectual to them that he happens to acquire during the marriage; it has no other effect than to be a limitation upon the father, that he cannot alter the destination established in their favours by substituting strangers; but as conquest is *nomen universitatis*, to no particular of which can the children lay claim, but to the *universitas* in general, the father, who may forbear to purchase, is at liberty to exerce every act of property after he does purchase; which, tho' it may alter or lessen the particular subjects that fall under the *universitas*, is not disposing of the *universitas* itself, or altering the destination established in the contract; but any mere gratuitous deed, without rational cause or consideration, will be understood an indirect method of altering the succession, & *fraus facta contractui*, and therefore ineffectual. Stair, 13th February 1677, Frazer *contra* Frazer. ---- Upon this footing it was found, That a provision of conquest to a wife did not bar the husband from making rational provisions to his children of a former marriage, provided a competency was left to the wife. Stair, 15th July 1673, Robson *contra* Robson. ---- The like, where the question was with the children of the second marriage, as heirs of conquest. Stair, 19th June 1677, Murrays *contra* Murrays. --- And even a small gratuitous bond to a child of the first marriage was sustained against the children of the second marriage, heirs of provision, tho' the grantee was otherwise provided; which was considered as a rational deed, and not done *in fraudem* of the obligation of conquest. Stair, 9th February 1669, Cowan *contra* Young. --- In like manner, a deed granted by a husband to his second wife, declaring, 'That tho' the marriage should dissolve within year and day, the contract, by which she was provided to a jointure of 750 merks, should stand good for 600 merks yearly, was found a rational deed, and effectual against the heirs of the first marriage, who in their mother's contract were provided to the conquest during the marriage. Stair, 16th, Dirleton, 20th June 1676, Mitchel *contra* Children of Littlejohn. --- And a provision of lands within three chalders of victual to a second wife and children, was sustained, tho' acquired during the first marriage, the heir of the first marriage, who was creditor in the clause of conquest, being otherwise competently provided. Stair, 3d January 1679, Gibson *contra* Thomson. --- And a man, in his contract of marriage, being obliged "to provide his conquest to himself and wife in conjunct-fee and life-rent, and to the heirs of the marriage; which failing, the one half to his heirs, and the other half to her heirs;" and there being a considerable conquest, but no bairns of the marriage, the Lords found a provision of the said conquest in favours of the children of a second marriage, was a rational and effectual deed, and therefore sustained the same against the wife's heirs. Stair, 1st and 21st December 1680, Anderson *contra* Bruce. --- A clause of conquest in a contract of marriage being to the children thereof, and one daughter only existing, who had also only one daughter by a first marriage, and marrying again, and the grandfather making that grandchild his universal legatary; in a competition betwixt this grandchild and her mother, the Lords sustained the universal legacy, and found, That the clause of conquest did not restrain the granter, but that he might even by testa-

ment

ment legate his goods to his grandchild, seeing the daughter had been competently provided by him in her first contract of marriage, and that the deed was not wholly gratuitous but rational. Fountainhall, 7th July 1698. Dalrymple, 20th January 1699, Cuming *contra* Kennedy and her husband. — But a man who was bound in a second contract of marriage, to provide the conquest to the children of the marriage, having in his testament made the whole children of both marriages his universal legatars, this being a mere gratuitous deed, altering the order of succession, was found not good against the clause of conquest. Stair, 19th June 1677, Murrays *contra* Murrays.

A DAUGHTER, by her contract of marriage, being provided to be a bairn in the house at her father and mother's decease, her provision was found payable at the father's decease, altho' the mother was still alive, notwithstanding of the above clause, and that because it could not be *in pendent* in the mean time till the mother should die, and that the mother had no right thereto, being prestable out of that part of the goods which belonged to the defunct, after separation of the wife's third. Durie, 8th February 1622, Finlayson *contra* Veitch. — A man having obliged himself to provide 4000 merks to himself and his wife in conjunct-fee and liferent, and to the children of the marriage in fee, and to pay the money to the children the next term after their mother's decease; she predeceasing, the children pursued their father for payment. Alledged for the defender, That the provision to pay the 4000 merks to the pursuers the first term subsequent to their mother's decease, supposed her to be the survivor, and was not intended as a renunciation of the father's conjunct-fee; the Lords found the father had the liferent of the sum during his life. Marcus, (*Contracts of Marriage*) February 1687, Irvine *contra* Irvines. — The terms of a contract of marriage being, That the children thereof should get payment of such a sum upon the death of the first deceiver; and the mother dying first, so that none could validly discharge the father, who was the children's administrator; upon a pursuit against him, at the instance of the children and their uncle, at whose instance execution of the contract was appointed to pass, the Lords thought it not fit to loose the filial dependence on parents; yet, in respect of the conception of the contract, they decerned to secure that sum to the children with the annualrent thereof, with power to retain in the first place for their future education and aliment. Fountainhall, 2d July 1696, Hamiltons *contra* Hamilton. — Anderson brewer having, in his contract of marriage, become bound betwixt and Whitsunday then next, to lay out 6000 merks of his own stock, and other 6000 merks payable to him in name of tocher, upon land or other sufficient security, to himself and spouse in conjunct-fee and liferent, and to the children of the marriage in fee; and soon after the term being charged to implement, suspended upon this reason, That however the clause was conceived, it could never be the intention of parties, that he should be bound to lay out his whole stock upon land, and thereby render him unable to carry on his business, or even to live comfortably, far less to make any conquest, which yet was in view, because it is also provided to the children of the marriage; the Lords were sensible, that the demand was rigorous, but they would not take it upon them to relieve the suspender against an express obligation, and therefore found

Provisions to children when prestable? *imo*, When a term of performance is specified.

the letters orderly proceeded.
Anderson.

June 1727, Anderson *contra* An-

2do, When
no term is spe-
cified.

IT being provided in a contract of marriage, That if the wife happened to die without children, the half of the tocher should return to her father, his heirs and assignies, and the husband, on his part, having become bound to add a certain sum to the tocher, and to imploy the whole on land or annualrent *to himself and spouse in conjunct-fee and liferent, and to the heirs of the marriage; which failing, to the husband's heirs, upon the provisions and conditions always above mentioned*; the case having existed, the question occurred as to the time of the return, it being contended, that it should be at the wife's decease, because no term of payment was expressed, and therefore *presenti die debetur*; the Lords found the husband ought to liferent the sum. Fountainhall, 19th, Dalrymple, 20th January 1699, Duncan *contra* Smeiton. — A man being bound, by his contract of marriage, for the tocher received, to stock and secure to the children of the marriage a certain sum; and there having been only one daughter of the marriage, and he being married again; in a pursuit at the instance of the daughter and her husband against the father, for implement of the contract of marriage, only to take effect at his decease: The Lords considering, That if this contract had nominated persons, at whose instance execution might pass, they could have charged for implement; but the father here being a merchant, and reserving to himself, not only a power of administration, but of disposal for carrying on his trade, and that it was not pretended he was *vergens ad inopiam*; therefore they refused to sustain action against him during his life. Fountainhall, 10th February 1709, Oliphant and her husband *contra* Oliphant. — A man who had received with his wife 8000 merks in tocher, having, in his contract of marriage, obliged himself, That if there should be only daughters procreated of that marriage, and he have no son of any subsequent marriage, that daughter should succeed to 20000 merks, but if he had sons, then she should have 8000 merks, half at her marriage or majority, and the other at his death, with a clause consenting, That execution should pass at the instance of some friends of hers, &c. and the wife dying, and leaving only one daughter, and the father marrying again, and removing his domicil and effects out of the kingdom, and the friends named having charged him, and raised inhibition and arrestment, the daughter being now married; the Lords were all clear of these two points, 1mo, That the father, tho' as yet he had not a son, ought to secure her in the fee of the 8000 merks, provided to her in the event of his having a son by another marriage, seeing he had transferred his domicil and retired his effects. 2do, That he ought to find caution to her for the annualrent of the 4000 merks as the first moiety due to her at her marriage, and whereof the term of payment was now come. Fountainhall, 2d July 1709, Hay *contra* Hay. — A man in his contract of marriage, having obliged himself to take all the conquest during the marriage to the children thereof in fee; and he having married a second wife, and one of the two children of the first marriage pursuing him for the half of the conquest, reserving his own liferent; the Lords refused to sustain any process at this daughter's instance, either for payment of the conquest, or so much as for liquidation, during the father's life; because such provisions being but mere destinations, the father remaining fiar, is not deprived of his fee by the dissolution of the marriage

riage, to be reduced to the shape of a liferenter, his fee remains with him for life, with power of consequence to exerce all acts of property, that are not in defraud of the provision of conquest; for which reason the conquest is not to be considered at the time of dissolution of the marriage, but at the time of the father's death; so that if there be no conquest then, or if he shall have disposed upon it all, they would have nothing to crave. Falconer, 7th, Fountainhall, 27th November 1684, Anderson *contra* Simpson. Fountainhall, 24th February 1685, Cruikshank *contra* Cruikshanks. — Upon the same footing, a rational provision granted to a second wife, was found effectual against the children of the first marriage, who, in their mother's contract, were provided to the conquest during the marriage. Stair, 16th, Dirleton, 20th June 1676, Mitchel *contra* Children of Littlejohn.

WILLIAM CRAIK in his marriage contract, became bound *to provide and secure himself, and the heirs-male to be procreated of the marriage*, in certain lands therein named; and further, *That he should not alter the foresaid provision and destination of succession, conceived in favours of the heirs-male of the marriage*; after the dissolution of the marriage, by the death of the wife, William Craik having but one son of the marriage, Adam, and one daughter, Jane, made a settlement of his estate in favours of his only son, and the heirs-male of his body (in terms of the foresaid contract of marriage) which failing, to the heirs-male of his own body; which failing, to his daughter and the heirs-male of her body; which failing, to the heirs-female of his son's body; and which failing, to his own heirs and assignies whatsoever, and the settlement contains the following provisions, "That it should not be understood to debar any of the heirs of tailzie from granting reasonable provisions to wives and children, or to contract debts for just and one-rous causes, but that they should have nowise liberty to disappoint the course of succession, by contracting debts unnecessarily, or making deeds or conveyances in prejudice thereof." Adam having raised a reduction of his father's settlement, upon this ground, That by the contract of marriage the father was bound to settle the succession of the estate upon him the heir-male of the marriage, and consequently upon his heirs whatsoever; and therefore was debarred from preferring his own daughter to his son the pursuer's daughter; the Lords found, That the provision in the contract of marriage being only to the heirs-male of the marriage, the father was at liberty to make such substitutions as he thought reasonable. 7th December 1728, Craik *contra* Craik. — Gordon of Auchline who stood bound in his contract of marriage to resign his estate in favours of himself, and the issue of the marriage, did, thereafter, execute a tailzie with clauses prohibitive and irritant to himself in liferent, and, after his decease, to Alexander Gordon, his eldest son, heir of the marriage, also in liferent, and to the heirs-male lawfully to be procreated of his body; which failing, to James Gordon his second son, and the heirs-male of his body; which failing, to the heirs-male of the tailzier's body of any other marriage; which failing, to the heirs-female of his body, &c. James Gordon, now of Auchline, in the right of the heir of the marriage, raised a reduction of this tailzie, insisting, That no father, who stands bound by contract of marriage to resign his estate in favours of himself and the issue of the marriage, can tailzie that estate with clauses prohibitive and

What understood to be sufficient implement?

irritant, in regard he is under obligations to make the estate not only to descend to the issue, but that it shall descend *tanquam optimum maximum*, and consequently not under irritant and resolute clauses, by which the issue would not be fiars, but liferenters of that estate. In the second place, That abstracting from the general point, this particular entail was an irrational deed and fraudulent, tending to evacuate the destination in favours of the heir of the marriage. Upon this head it was observed, That the estate was small, burdened moreover with a liferent and considerable debts; 2dly, That the heir was not impowered to charge the estate with a shilling to redeem him from slavery; 3dly That the heir had no power to provide wife or children; 4thly, That the heir-male of the marriage was cut out and made a liferenter, and the heirs-female of the marriage postponed, even to the youngest daughter of the maker of the tailzie, contrary to the provision of the contract, which is in favours of the heirs of the marriage. The Lords did not determine the general point, but with respect to the particular qualifications insisted on they found, That this tailzie was not consistent with the provisions in the contract of marriage; and therefore reduced the tailzie. 11th December 1731, Gordon of Auchline *contra* Christian and Barbara Gordons. --- An estate being provided in a contract of marriage to heirs whatsoever of the marriage; of the marriage there existed two sons, and the father, while the eldest son was yet minor, made a settlement of his estate upon him, and the heirs-male of his body, which failing, to the second son and the heirs-male of his body, &c. upon which infestment was expedite; the eldest son died before his father, leaving a daughter behind him, but without accepting of the disposition; in a competition betwixt the heir-female and the heir-male, it was contended for the heir-female, that she was heir of the marriage, and that the father had it not in his power arbitrarily to disappoint the marriage-settlement. Answered, Tho' the eldest son cannot, strictly speaking, be heir of the marriage while his father is alive, seeing he may die before his father, and so never be capable of succeeding; yet it is received in our law, That a father may implement the obligations he comes under in his contract of marriage, by disposing in favours of the heir expectant of the marriage, and the contrary doctrine would be highly prejudicial to the heirs of the marriage, seeing it would exclude the father from making a settlement upon them during his life. 2do, A provision to heirs whatsoever of the marriage, is not the same with a provision to the heir-male of the marriage; the last points out a particular person, the other is rather negative, barring extraneous heirs, but leaving the father *intra familiam* to prefer one to another, especially males to females, agreeable to the ordinary course of law. Replied to the first, Such settlement may be effectual in law, where the heir of the marriage survives the father; because this would be implement directly in the terms of the contract; but a disposition in favours of the heir expectant of the marriage, is not implement of the contract, seeing it is not in favours of the heir of the marriage, but of one who never was heir; and were this doctrine to hold, it would open a door to evacuate obligations in contracts of marriage however strictly conceived; the father would have no more ado, but the moment his son was born, to settle the fee upon him, with a power to alter, and naming such substitutes as he had amind, excluding possibly the whole other heirs of the marriage; as he has a thousand chances to one

one that the infant shall not survive him, he has all these chances for him to disappoint the obligations he came under in his marriage contract. To the second, a provision to heirs whatsoever, points out the pursuer just as directly as it had been to the eldest son to be procreated, and the heirs of his body, and the granter ought to have no power to prefer the heir-male to the heir-female in this case, more than he has to prefer the second son, when the provision is to heirs-male of the marriage. The Lords found, That the contract of marriage was sufficiently implemented, by the father disposing his lands to his eldest son, and his heirs-male, &c. and therefore preferred the heir male to the pursuer, heir-whosoever of the marriage. 7th January 1737, *Trail contra Trail*.

—A father having granted an assignation to his daughter, the only child of the marriage, in implement of his contract of marriage, by which he was bound to imploy that sum in favours of the children of the marriage, which failing, in-favours of himself, his heirs and assignees, but with this express clause, That in case she should die without heirs of her body, he, *per verba de presenti*, assigned the subject in favours of his brother; and the daughter having legated the subject after her age of 14, the Lords preferred the brother. *Harcus, (Contracts of Marriage)* February 1683, *Bonar contra Arnot*. *Falconer*, 22d February 1683, observes the decision as if the contrary had been found.

A MAN obliged in his contract of marriage to imploy a sum upon bonds, annualrent or other security, and take the right to himself and spouse in liferent, and to the children of the marriage in fee, was found not to have implemented the contract by taking rights in the terms aforesaid to a lodging in a burgh bought by him, estimated by knowing persons to be worth so much. *Forbes*, 29th December 1710, *Hay contra Hay*. — But in respect the contract bore, that the security to be taken for the money should be such as he thought sufficient at the time; the Lords found the tenement to be sufficient security. *Forbes*, 18th January 1711, *inter eosdem*.

AN obligation in a contract of marriage, to provide a certain sum to the granter and his spouse in conjunct-fee and liferent, and to the children of the marriage in fee, implies a discretionary power in the granter to divide the subject among his children, giving to one more and to another less. *Forbes*, 19th July 1706, *Edmonston contra Edmonston*. — In a provision of sums, lands, and conquest, to children, in a contract of marriage, the Lords found, That the father had a power of making an unequal division of the sums, lands and conquest amongst the children of the marriage, but that he could not totally exclude any of them, without a cause, from a share thereof. 9th January 1728, *Dowie contra Dowie*. Ingrossed in the decision *Home*, February 1728, *Henderson contra Henderson*. — In a contract of marriage, tho' the estate be provided to the heir of the marriage, the father has a discretionary power, upon rational considerations, to pass by the heir, and give the estate to another son of the marriage. *Home*, 10th July 1724, *Douglas contra Douglas*. — Colonel Campbell being bound in his contract of marriage to secure the sum of 40,000 merks, and also the conquest during the marriage, to himself and spouse in conjunct-fee and liferent, and to the children to be procreated of the marriage in fee, did purchase the estate of Burnbank during the marriage, taking

Father's power of distributing among his children the subjects provided to them.

the rights thereof to himself, his heirs and assignees, and, upon death-bed, did execute a deed, settling both the heretable and moveable estate upon his eldest son, with the burden of certain provisions in favours of the younger children; in a reduction of this settlement, at the instance of the younger children, it was pleaded for them, That they were creditors *per capita*, each entitled to an equal share; and supposing the father to have a power of division, it was irrational to leave the whole to one, burdened with small provisions in favours of the rest. It was pleaded in behalf of the defender, That an obligation granted *familiae*, makes the family, as a body politic, creditor, so as to restrain alienations *extra familiam*, but does not make each a creditor *per capita*, to restrain the father from giving the whole to any one he pleases; the Lords found, That each of the children are entitled to a share in the special sum and conquest, but that the father had a power of division of the sum and conquest among his children in such manner as might be found rational, and therefore that he might lawfully acquire a land estate, and take the rights thereof to his eldest son, and might also dispoise his moveable estate to him, with the burden of rational provisions to his younger children. 16th December 1738, Campbells *contra* Campbells.

PROVISIONS to children, how far safe against a reduction upon act 1621. See Bankrupt.

BOND of provision not effectual until delivery or death. See Delivery.

NOT presumed delivered of the date. See Presumption.

WHEN understood delivered. See Presumption.

RIGHTS taken by parents in name of children, when revocable? See Presumption.

PROVISIONS in a contract of marriage, or otherwise, how far they imply limitations upon the receiver. See Fiar absolute limited.

PUBLICK BURDEN.

A WIFE being infeft in certain lands for an annuity of 2000 merks yearly, which sum the husband obliged himself to pay, infeft or not infeft, and to warrant the lands to be worth 2000 merks yearly, the annualrent was found liable for the publick burdens. Stair, 22d January 1668, Lady Wamphray *contra* Ld. Wamphray. — Found, That a liferent of an annualrent of money or victual due to a relict, was subject to publick burdens, as well as a liferent of lands, unless there be a personal obligation to pay. Harcus, (*Liferents*) January 1688, Lady Elshiels *contra* Ld. Elshiels. — The like, Harcus, (*Contracts*)

tracts of Marriage) February 1686, Lady Samford *contra* Tenants. Fountainhall, 13th December 1704, Lumisden *contra* Robertson.

THE feu-duty payable to the superior, being truly part of the rent of the lands, the publick burdens and cesss must be born by the superior and vassal in proportion to their several interests. Fountainhall, 25th February 1696, Treasurer of Edinburgh *contra* Feuars of Burrowmuir. Fountainhall, 7th December 1693, Feuars of Kinross *contra* Sir William Bruce.—A feu-duty reserved by the Sovereign in a charter of lands of his property, was found not liable to cesss after dissolution thereof from the crown in favour of a subject. Forbes, 13th July 1711, Duke of Montrose *contra* Feuars of Kirkpatrick.

PUBLICK OFFICER.

COMMISSARIES have no power to name their clerks and procurator-fiscals, but only the bishop within his own diocess, and a commission given to a commissary to admit procurators and other members of court, does not empower him to name these officers. Durie, 12th July 1627, Bishop of Galloway *contra* Inglis.—Found, That an heritable sheriff, not having an express power in his charter to nominate sheriff-clerks, has no right to dispose of the office, but that the same belongs to the secretaries of state. Fountainhall, Forbes, 17th July 1705, Duke Athole *contra* Earl Eglinton.—The Lords found, That the Lord Lyon has a power of naming his clerks during their lives. 5th July 1728, Lord Lyon *contra* Erskine.—In whom the power of presenting the session-clerk and præcentor lies. See 20th July 1738, Kirk-session of Linlithgow *contra* Magistrates.

Who have power to name clerks, &c.

OLIPHANT having obtained from the Clerk Register a grant of the office of clerk of session to himself, and his eldest son *nominatim* after his decease; and this grant being challenged, *quoad* the son's right, by a succeeding Clerk Register, the Lords unanimously found the son had no legal right by the gift; for if this were once allowed, the office of a judge of the court of session might come to be entail'd as well as that of a clerk. Fountainhall, 15th December 1693, Lord Tarbat *contra* Oliphant of Langtoun.

Grant of a publick office cannot exceed one life.

MONCRIEF of Redie having the King's gift, empowering him forever to present one of the macers of session; it was objected, *imo*, That the same was null, seeing *beneficium non vacans nequit conferri* by analogy of the act 23, parl. 1567; the Lords repelled this objection, because a power of presenting is a different thing from an actual presentation; and if this was sustained, a right of patronage would ly under the same exception. *2do*, they repelled the objection, That Redie's gift was null on the act 69, parl. 1587, that his majesty's casualties shall not be given away in great; for they thought the King might lawfully annex the presentation of the macers to the judicatory of the session.

But the power of presenting may be given in perpetuum.

session for ever; and if so, why not to one man, which, tho' inconvenient, was not unlawful? Fountainhall, 2d February 1693, King's Advocate *contra* Moncreif of Redie.

An delegatus potest delegare?

NOTWITHSTANDING the rule, That *delegatus non potest delegare*, the Lords sustained a gift of under-clerkship of the bills during the granter's life, it being the constant custom established, for the clerk of the bills to grant subcommissions, tho' he had no power to delegate. Falconer, 12th February 1684, Wedderburn *contra* Oliphant. — A clerk of chancery was found to have no power by his commission to delegate a substitute, and therefore was ordained to exercise the office by himself or his servants, for whom he should be answerable. Home, December 1681, Hog *contra* Sir William Ker.

Plurality of offices.

A GIFT by a bishop, of the office of commissary clerk, falls, when the same person is named commissary. Durie, 12th July 1627, Bishop of Galloway *contra* Inglis.

No deprivation from office without a reasonable cause.

A SCHOOL-MASTER in a royal burgh, whose admission bore neither during pleasure nor *ad vitam*, found not to be removeable arbitrarily at the magistrates pleasure, but that for any just and reasonable cause they might, without necessity to condescend upon any malversation. Fountainhall, Dalrymple, 18th January 1710, Magistrates of Montrose *contra* Strachan.

Grounds of deprivation.

A PRINCIPAL clerk who had a power of deputation, being insolvent and denounced rebel, this was not found to annul his right, or make him fall from his office, it having all along been managed by a depute, tho' it was argued, That the principal clerk not having *personam standi in judicio*, his depute could not sit for him who could not sit himself. Stair, 6th February 1666, Archbishop of Glasgow *contra* Logan. — A sheriff-depute being denounced at the horn, this was not found to exclude his substitute. Stair, 9th June 1681, Keith *contra* Earl Southesk. — The clerk to the notaries, by his office, is bound to call in and keep the prothocals of notaries, which, being special in his commission, and wholly neglected by him for many years, was found a malversation to infer deprivation. Stair, 19th February 1680, Clerk Register *contra* Primrose. — A party having been made one of the clerks in chancery by the director, to whom he paid a valuable composition for the post, and being soon thereafter turned out of his office by the director himself, upon some alledged malversations, but without the sentence of any judge, the Lords, in a declarator at the clerk's instance against the director, reponed the clerk to his office, and ordained the director to receive him. Home, December 1681, Hog *contra* Sir William Ker. — A declarator was sustained at the archbishop of Glasgow's instance, concluding, that commissaries, such as are not qualified, nor able to judge according to law, may be deprived by the bishops. Stair, 14th February 1666, Archbishop of Glasgow *contra* Commissary of Glasgow. — The same. Stair, 22d February 1666, *inter eosdem*.

THE

THE director of the chancery may recal commissions granted by him, and put out his own servants at his pleasure. Stair, 16th January 1680, *Achison contra Ker*. Who removeable at pleasure?

A NOTARY refusing to serve a free liege in his office, may be punished to be punished in his person and goods. Haddington, *penult.* February 1612, *Innes contra* three notaries in Elgin. Publick officers are publick servants.

THE clerk of the bills having received a minor cautioner in a suspension, who thereafter reduced the bond upon minority, and the bond being now also amissing, tho' it could signify nothing, being reduced; yet the Lords upon a complaint ordained the clerk to produce the principal bond of cautionry betwixt and a certain day, otherwise found him liable for the debt, because there might be an attester on the back of the bond. Home, December 1681, Denholm supplicant. — The clerks of the bills having lost a bond of cautionry in a suspension, but getting the same renewed some years thereafter; the Lords found, That they were no further liable than *subsidiarie* for damages; further their Lordships sustained this defence, That the time of granting the second bond, the cautioner was in no worse condition than at the time of granting the first. Bruce's MS. 10th July 1716, Deuars *contra* Clerks of the bills. — The clerks of session are liable for writs amissing out of their respective offices, without necessity to prove fraud or negligence against them: For the clerks who have the custody of writs ought to exoner themselves of their trust, by proving the *casus fatalis*. 4th July 1735, Home of Slatehouse *contra* M'Kenzie and Justice. Diligence required of publick officers.

AN arrestment being loosed on insufficient caution; the Lords refused a bill craving a warrant for commanding more sufficient caution, tho' they had granted it before in a like case; only here they reprimanded the clerk of the bills. Fountainhall, 19th June 1678, Wilkie *contra* Morison. — The clerk to the bills refusing to accept of caution above exception in the loosing of arrestments; application being made to the Lords, and trial taken by them how the arrester's claims were founded, they thought it might be of dangerous consequence to interpose, and judge as to the sufficiency of caution offered, this being the peculiar province of the clerks; yet if the clerk should refuse cautioners above exception, no doubt they had power to overrule them; therefore the Lords ordained the cautioner to be received. Fountainhall, 18th February 1701, Temple *contra* Wallace of Inglisfoun. — In a pursuit against the commissary clerk, at the instance of the defunct's creditors, for damages sustained by his having received insufficient caution in a testament dative; the Lords found, That caution must be taken by the commissaries and their clerks, and that the caution must be sufficient, consideration being had to the circumstances of the parties at the time; and therefore found it relevant against the defenders to make them *subsidiarie* liable, that the cautioner accepted of by them was insufficient. 1st July 1737, the Ladies Margaret and Dorothea Primroses *contra* the Commissary Clerks of Edinburgh. Where sufficient caution is refused, or insufficient accepted of, what remedy?

By act 30th, parl. 1469, and act 78th, parl. 1563, notaries must be named and created by the King, and examined and admitted by the Lords. Form of admitting notaries.

Lords ; but an abuse having crept in of applying to the court of session to be admitted notaries, without any authority from the crown, this was rectified upon an application of the clerk to the admission of notaries, and in time coming the clerks of session were discharged to receive in any petition for any person's trial in order to admission as a notary, unless there were presented therewith, and lodged in the clerks hands, a presentation signed by the clerk to the admission of notaries, and past under his Majesty's Cashet. 21st February 1738, Mr. John Crawford suppliant.

Town-clerk
not a magi-
strate.

A TOWN-CLERK is not a magistrate ; and therefore he being charged for performance of the town's obligation along with the magistrates, the charge was found null. Durie, 15th January 1624, Ld. Drumlanrig *contra* Bailies of Hawick.

PURPRESTURE.

BUILDING upon the high street of a burgh was found purpresture, and that the building belonged to the King. Balfour, (*Purpresture*) 10th November 1597, Cockburn *contra* Ramsay.

QUAKERS.

A LIBEL being referred to a quaker's oath, and he offering to declare the truth, as in the presence of God, but refusing to hold up his hand, or depone in the usual terms, (by God) and the pursuer refusing to accept of his declaration in that form ; the Lords found, That they could not dispence with the formality, and therefore held him as confest, if he refused to depone in the manner introduced by the law and custom of this kingdom. Fountainhall, 18th January 1678, Tailfer *contra* Bartholomew Gibson.

BUT thereafter, in the like case, a point being referred to the oaths of two quakers, and they refusing to depone in the common form (by God himself) but offering to declare in these terms, (I solemnly declare, as in the presence of God, and as I shall answer to God at the great day, I shall declare the truth) and further, offering to underly the legal punishment of perjury, if what they thus declared should be redargued of falsehood ; the Lords found, That the *formula* offered was upon the matter an oath ; and therefore allowed them to depone in the terms thereof, there being many quakers who will not go that length. Fountainhall, 20th November 1707, Hodge *contra* Gibson and Miller.

THE solemn affirmation or declaration of a quaker in these words, (I do declare, in the presence of Almighty God, the witness of the truth of what I say) was accepted by the Lords, instead of an oath in the usual form, conform to the statutes of England. Forbes, 26th February 1710, Anderson *contra* Forbes of Blackfoord.

IN

IN a ranking of creditors, the Lords allowed a quaker to give a declaration upon the verity of his debt as equivalent to an oath. Forbes, 29th January 1713, *contra*.

THE Lords sustained a declaration upon faith and honesty, emitted in Holland by anabaptists (whose religion does not allow them to take an oath) as equivalent to an oath. Forbes, 20th March 1707, Edins and Home *contra* Hunter.

QUALIFIED OATH.

A PURSUER having referred to the defender's oath, that he had given him a certain sum on his promise to repay it, and the defender deponing and confessing, that he received the money, but adding, That it was in payment and satisfaction of as much due to him by the pursuer, and that he never promised to repay it; the Lords found the quality intrinsic: For the quality here resolved into a denial of the libel. Fountainhall, 10th November 1702, Aitken *contra* Finlay. — In a compt and reckoning, the receipt of 500 merks being referred to the defender's oath, he acknowledged the same, but added, That the pursuer at that time was debtor to him, the deponent, in several sums; the Lords sustained the article of 500 merks, and found the quality extrinsic, seeing the defender did not depone, that the money was given and received in satisfaction of these other debts. Dalrymple, 18th December 1703, Sinclair *contra* Sinclair. — A debtor in a bond having offered to prove payment by the creditor's oath, and the creditor having deponed, that his wife received from the debtor a certain sum, owing to him by a third party, which the debtor had promised to pay; the Lords found the quality in the oath intrinsic; and the sum received by the wife, was found not imputable in payment of the bonds. Forbes, 27th November 1705, Sinclair *contra* Sinclair. — Yet in a pursuit upon a bill, an alledgeance being made for the defender of a partial payment, which was referred to the pursuer's oath, and he deponing, that he received L. 5 Sterling, but that it was in payment of a separate open accompt; the Lords found the quality extrinsic, and that the partial payment behoved to be applied to the bill, unless the pursuer would instruct the open accompt otherwise than by his own oath, notwithstanding, That the alledgeance of partial payment was not proved, the oath resolving into a denial thereof. February 1730, Cameron *contra* Danskine. — The like. Gosford, 6th January 1670, Reid *contra* Binning. — A party pursuing his wife's father for the tocher, because, tho' he had granted the receipt of it in the contract of marriage, yet that discharge was elicited, and given *spe numerandæ pecuniæ*, and this being only probable *scripto vel juramento*, and he referring it to the father's oath, who deponed, that it was communed, the said clause granting the receipt should be inserted, but that the money was neither paid, nor promised to be paid, so that there could be no *spes* in the case; the Lords affoizied the father-in-law. Fountainhall, 20th January 1685, *contra*.

Where the
the qualified
oath imports a
denial of the
libel.

. — A man upon oath being examined, whether the

money he lent out to a corporation belonged to another person, whose trustee he was; and he confessing that the party (now dead) had, some while ago, lodged such a sum in his hands, but that afterwards he called for it, and disposed of it otherwise; the Lords found the quality intrinsick. Fountainhall, 20th February 1685, Home *contra* Coult.

In a process for payment of a hogthead of wine, referred to the defender's oath as resting owing, and he acknowledging the receipt of the wine, but adding, That it was sent him to be disposed of, and that he sold the same at a certain price; the Lords found the quality intrinsick. Stair, Newbyth, 9th December 1664, Learmont *contra* Ruffel. — A Bargain of wine being referred to the purchaser's oath, and he having acknowledged the bargain, but deponing, That he refused to accept of the wines, because they were spoiled and insufficient; the Lords found the quality of the oath to be intrinsick, and reduced a dean of guild's decret finding it extrinsick. Home, January 1687, Trotter *contra* Clark. — A bargain being referred to the defender's oath, he deponed, *That there was such a bargain as libelled*, but that it was agreed to be perfected in writ, and that before the writings were perfected he did refile; this quality was found intrinsick. Stair, 12th January 1676, Campbell *contra* Douglass. — Lauder insisted against M'Gibbon and Medina for payment of a certain sum, as the price of goods furnished to them, and referred all to their oaths; M'Gibbon acknowledged the receipt of some goods, but adjected this quality, that he received them in consequence of an agreement for teaching the pursuer the violin; Medina also acknowledged the receipt of some goods, with this quality, that he got them in consideration of pictures he was to draw of the pursuer and his Lady, that he had made ready canvasses and was still willing to perform. The Lords found these qualities intrinsick.

January 1727, Lauder *contra* M'Gibbon and Medina.

A SUM of money being referred to oath as resting owing, the defender deponed, That he was once resting the sum by a ticket, but that the ticket was delivered back to him by the pursuer's wife, in satisfaction of the like sum, owing to him by her first husband; the Lords found the quality intrinsick, and refused to put him to prove the debt due to him by the first husband. In this case it has been supposed, That the wife's having her husband's writ, presumed a mandate to give it up to the debtor; for otherwise, denying a libel upon an irrelevant ground, is an indirect acknowledgement of it. Gosford, 6th February 1669, Brown *contra* Mitchel. — A party being pursued for some money he was trusted to receive, and deponing, That he sent it by another, and that he was impowered so to do; the Lords admitted the quality, reserving action against that other. Fountainhall, 9th November 1678, Gordon *contra* Christie.

AN apparent heir being pursued upon the passive title of intromission with his predecessor's writs, and having declared upon oath, That he meddled with no papers, save what were his own by assignation, which his predecessor had made to him of all his personal estate; thus making himself judge of what belonged to him, and having owned his entering the closet, where all the defunct's writs were, without either the presence or warrant of a judge, yet the Lords assilzied the apparent heir, and refused to divide his oath. Fountainhall, 28th January 1698, Earl Airly *contra* Sharp.

RESTING

RESTING owing of a merchant accompt, after the three years, being referred to oath, and the defender acknowledging, that he received the goods from the pursuer and his partner, and paid the same to the partner; the Lords found the quality intrinsick, for here the oath did not prove the libel *resting owing*, on the contrary resolved into a denial of the libel, consequently the defender fell to be affoizied. Fountainhall, 22d December 1702, Nicolson *contra* Murray. — Yet, in a like case, where resting owing was referred to the defender's oath, the Lords, tho' they sustained a quality adjected to the oath, of payment in money, they refused to sustain a quality of satisfaction, by the pursuer's accepting of goods in part payment, and found, That the delivery of the goods must be otherwise proved than by the defender's oath. Dirleton, 26th June 1675, Gilchrist *contra* Murray. — But this quality, That at receiving the goods, the pursuer agreed to accept of other goods in payment and satisfaction *pro tanto*, and that the deponent had accordingly furnished other goods to the pursuer, was found intrinsick, as being *pars contractus*. Fountainhall, 5th June 1711, Forbes *contra* Debtors of Craigy. — An accompt of furnishing being referred to oath, the defender acknowledged the accompt, but added, That it was pactioned the drugs he furnished to the pursuer's family, extending to the sum of , should be allowed in part payment; the Lords found the quality intrinsick, but that the defender's oath was not a constitution of his accompt, and allowed him a diligence to prove the same by witnesses. Fountainhall, 8th February 1707, Maitland *contra* Baillie. — In a pursuit for the rent of a house prescribed *quoad modum probandi* by witnesses, and referred to the defender's oath, he having deponed, That it was not resting, but that payment thereof was made by a third person's allowing the like sum to the pursuer upon account thereof, which the deponent allowed to that third person at compting; the Lords found the quality in the oath intrinsick. Forbes, 6th July 1711, Clark *contra* Dallas. — A claim for the price of sheep prescribed *quoad modum probandi*, being referred to the defender's oath, he acknowledged the bargain and price, but added, That some time after the bargain he paid the price to a third party by the pursuer's express order; the Lords found the quality intrinsick. 14th January 1737, Moffat *contra* Moffat.

Where resting owing is referred to oath, payment or satisfaction if intrinsick?

A DEBITOR in a forthcoming, to whose oath resting owing was referred, acknowledging that he was due a sum of money by bond, but that he had paid a part thereof by certain bolls of meal, &c. this was not found an intrinsick quality, the debt being acknowledged due by writ, and therefore the exception only probable by the creditor's writ or oath. Stair, 21st November 1679, Allan *contra* Young. See a similar case, Stair, 24th December 1679, Home *contra* Taylor. — A sum of money being put by a man in his agent's hands to be expended upon his account, and resting owing being referred to his oath, he acknowledged the receipt of the money, but added, That he expended the same upon his constituent's law-affairs before the session, and in payment of his creditors; the Lords found the quality extrinsick, because it was a part of his trust to discharge himself by written documents, and the adjected quality would not have been probable by witnesses. Forbes, 23d December 1707, Brown *contra* Dow. — In a tutory accompt, a relict, as tutrix to her son, being ordained to depone upon the charge given in by the pursuer, and she refusing, unless

What if the payment or satisfaction be of that nature, not to be probable by witnesses?

she were also allowed to depone upon the discharge; the Lords found, That she ought to depone simply upon the charge without any quality, and that having deponed, she might give in her discharge and prove the same; for a tutor ought to have instructions of discharge, and no other proof can be sustained save his party's oath. Newbyth, 15th November 1665, Cant *contra* Lochs.

Where the libel as laid is irrelevant.

As possession presumes property in moveables, a libel concluding restitution upon intromission with moveables, cannot be relevant, unless the pursuer qualify *quomodo desit possidere*; and therefore, when such a libel is referred to the defender's oath, he may either object to the relevancy, or set forth the title of his intromission, and protest for a qualified oath, which will be sustained to him. Stair, 3d February 1672, Scot of Gorrinberry *contra* Elliot. — Upon this footing intromission with corns being referred to a party's oath, and he proponing, That he had lawfully pointed them, the Lords found, That the party might depone upon his exception, and refused to burden him with producing the ground of debt or diligence. Durie, 10th July 1632, Lord Fenton *contra* Drummond. — And intromission with moveable subjects being referred to oath, that they were freely gifted, was found an intrinsic quality. Durie, *ibid.* Forbes 5th January 1710, Mortimer *contra* Archibald. — The price of a horse delivered to the defunct being claimed against his executor, and the delivery referred to oath, the executor deponed, That the horse was given to the defunct in satisfaction of debt; the Lords sustained the quality as intrinsic. Forbes, 24th June 1708, Pringle *contra* Manderston.

The same was found with regard to an intrometter with a sum belonging to the pursuer, the defender deponing he had the pursuer's orders to uplift for payment of a demand he had upon the pursuer; tho' here there was not *par ratio* for finding the quality intrinsic, because intrometting with money does not presume a title. Fountainhall, 14th November 1677, Edgar *contra* Ewing.

BUT as intromission with a party's moveables, after his decease, will not be presumed to be upon a title, because possession in that case does not presume property, vicious intromission being referred to a defender's oath, and he acknowledging that he got the goods from a third party, who had a disposition from the defunct, the quality was not respected, seeing he did not produce the disposition. Stair, 29th November 1679, Irvines *contra* Kilpatrick.

As *chyrographum apud debitorem præsumitur solutum*, therefore in an exhibition of a bond against the debtor as haver, he may either object to the relevancy of the libel, or adject any relevant cause, such as payment or donation, to qualify how the bond came to be retired by him; and in the present case the defender qualifying in his oath, That the bond was given him up by the defunct, upon condition that he should be at the expence of her funerals, which he carefully performed; the Lords found the cause of retiring intrinsic, but that the defender behaved to prove the condition implemented otherwise than by his own oath. Fountainhall, 13th November 1702, Walker *contra* Clark.

No exception will be sustained, unless proponed at litesconfestation.

A DEFENDER sued for the price of a horse, deponing, That he bought the horse for L. 24 Scots, and afterwards delivered a cow to the

the pursuer, which he accepted in satisfaction of the price of the horse, the Lords found, That if the acceptance of the cow had been a part of the original bargain, or if the defender had deponed upon payment, tho' *ex post facto*, in money, which was the natural performance of the bargain, the quality would have been intrinsic, but being the acceptance, *ex post facto*, of a cow for the price, which was in effect a new bargain of sale, that the quality was extrinsic, and behoved to be proved. Here the defence being satisfaction and extinction, was plainly an intrinsic exception, eliding the presumption of resting owing; but the ground of the decision has been, that the exception ought to have been proponed at litiscontestation, and a relevancy sustained upon it, if which had been, it is scarce to be doubted but the defender would have been allowed the benefit of his own oath to prove his exception, in the same way as he would have been allowed the benefit of the pursuer's witnesses, had a proof *prout de jure* been chosen; and the act of sederunt 7th December 1613, favours this opinion, and there is reason for it; where a bargain is made before witnesses, it will naturally occur to call the same or other witnesses to the performance, but where the defender is the only witness by whom the bargain can be proved, he will not think of calling any other witness to the performance. Stair, 3d January 1674, Gordon *contra* Cufigne. — In a process for damage against the cautioner in an indenture, occasioned through the apprentice's diverting from his service, the apprentice his having diverted, being referred to the cautioner's oath, and he having declared with a quality, That the master had beaten and put away the boy, the Lords found, That the quality being, *super facto alieno*, did resolve in an exception, which he should have proponed, and could not be proved by his own oath. Here to elide the alledgeance that the apprentice had diverted, it was obviously relevant to answer, that it was by the master's fault; but this answer ought to have been proponed at litiscontestation, and admitted to proof. Dirleton, 6th November 1667, Fife *contra* Daw. — In a pursuit by a sailor against a skipper for his wages, both the service and *quota* being referred to the defender's oath, and he acknowledging the same, but adjecting in his oath divers instances of the pursuer's unfaithful and undutiful service, the Lords decerned for the wages confessed, and found the qualities extrinsic, reserving the master action for liquidating his damages against the pursuer, as accords, upon his malversations; for these facts ought to have been proponed before litiscontestation, and as they were relevant, seeing the libel was referred to the defender's oath, he ought to have protested for a qualified oath. Fountainhall, 12th December 1699, Workman *contra* Young.

It being objected against a bond which was made the ground of a pursuit, That it was null, as wanting witnesses; and the pursuer referring holograph to the defender's oath, he acknowledged the fact, but added, that he had paid the debt many years ago; the Lords rejected the quality as extrinsic: For this exception could not be proved when it was not admitted to proof; besides, as a holograph bond is good in law, and proves the debt to be resting owing, without the aid of any presumption, nothing was wanting to complete the proof but to make out that the bond was holograph. Durie, 1st July 1624, Kinlochie *contra* Lord Conservator. Forbes, 20th June 1705, Grant *contra* Anderson. — It is otherwise where the bond is not holograph, the defender is not bound to depone *simpliciter* upon the verity of the subscription,

subscription, because a bond without witnesses not holograph, tho' it may be a true deed, is held not to be probative; therefore the defender may chuse either to plead, that it is not relevant to refer the verity of the subscription to his oath, but that the debt must be proved resting owing, or, which comes to the same, he may acquiesce in the reference to oath, with liberty to depone in the same manner as if resting owing were referred to his oath. Durie, 11th February 1634, *Cassibro contra Irvine*. ---- But where the verity of a subscription is referred to oath, the defender acknowledging the subscription, is not allowed to add this quality, That he had paid the debt; because this resolving into an exception, ought to have been proponed before litif-contestation, and a qualified oath protested for. Durie, 9th February 1631, *Barrens Dutchman contra Hutchison*. ---- As a bond of provision is virtually a delivered evident, and effectual *ipso facto* upon the granter's decease, an exhibition of such a bond being pursued against the relict, and the same referred to her oath, an adjected quality, That the bond was delivered to her by her husband to be cancelled, was not sustained; for the defender ought to have proponed this alledgeance in order to have it sustained relevant, which would have inferred an acknowledgment of the libel, after which the defender would have been left to prove her exception the best way she could be served; but when her having the writ was found *simpliciter* relevant, no more was necessary but to prove the fact in order to have decreet. Fountainhall, 2d July 1712, *Forbes contra Lady Culloden*.

Compensa-
tion extrin-
sick.

A House rent, which was the ground of the pursuit, being referred to the party's oath, he acknowledged the debt, but added, that he had furnished wine to the pursuer to a certain extent; this resolving into an extrinsick exception of compensation, and which was consistent with his resting owing the debt pursued for, it was found, That the pursuer had proved his libel, *viz.* That the house rent was resting owing, and therefore decerned for the same, leaving the defender to follow out his ground of compensation as accords. Spotiswood, (*Probation by oath*) 29th July 1628, *contra Simpson*. ---- The like. Fountainhall, 5th June 1697, *Borthwick contra Ramsay*. ---- A debt being referred to oath, and the defender deponing, That he compensated the debt, by the pursuer's detaining for several years the farms of his lands; the Lords allowed of this compensation, because of the qualified oath, altho' the exception was no otherwise instructed, nor was it shown that the pursuer possessed the lands, nor what was the farm thereof, nor what were the prices of the farms these years, nor lastly, that the deponent had right thereto. Here the compensation has been considered as an *ipso jure* extinction of the debt sued for, which would make the oath resolve into a denial of the libel. Durie, 28th March 1629, *Gall contra Eviot*. ---- In a pursuit for the price of wines, the libel being referred to the defender's oath, he acknowledged the libel, but added, that the pursuer was debtor to him in a greater sum by bonds and decreets; this quality was found extrinsick, and that it must be proved by way of exception. Stair, Newbyth, 9th December 1664, *Learmonth contra Ruffel*. ---- In an action for debt, at the instance of an assigney, referred to the defender's oath, and he having deponed acknowledging the debt, but with this quality, That the cedent had got goods from him to the value; the Lords found,

found, That this quality did not instruct the compensation, and seeing the oath did not bear, that the defender gave the goods in satisfaction of the debt, it did not prove payment as it would have done had the quality been so conceived. *Harcus, (Compensation)* November 1687, Johnston's assigney *contra*

IN an exhibition of a contract of marriage at the instance of a child of the marriage, in whose favours a provision was stipulated, and the father defender acknowledging the contract, but adding, That he had cancelled both doubles, as being signed by him in his minority without consent of his curators, and therefore null; the Lords found the quality extrinsic; for here the quality did not even amount to a relevant defence *esto* it were proved. Forbes's MS. 16th July 1714, Corfe *contra* Sir John Kennedy. — A verbal tack being referred to a party's oath, and he deponing *affirmative* to the libel, but adjecting, that an irritancy was pactioned in case of failzie, and that the failzie was incurred, the libel was found proved, reserving to him action for declaring the failzie for contraveining the conditions, &c. Haddington, 15th June 1611, Ld. Torsons *contra* Pringle.

Where the
adjected qua-
lity is not re-
levant.

Quod ab initio vitiosum.

Convalescence of a null Right.

THE King having made a donatar to the nonentry of lands when the fee was really full, but thereafter the lands falling in nonentry by reduction of the vassal's retour and sasine, the Lords nevertheless found the gift void. Sinclair, *ult.* July 1543, Stewart *contra* Ld. Lufs. — A tack of teinds granted by a parson without consent of the patron, was sustained, the tack being afterwards assigned to the patron himself. Stair, 19th January 1669, Earl of Athole *contra* Robertson. — A charge of horning upon a moveable debt, at the instance of a person condemned to death, and whose escheat was fallen, was found null, tho' afterwards he procured a remission. Falconer, 2d January 1683, Coult *contra* Somervell.

Citation *cum processu*.

A PROCESS against an heir-male for his predecessor's debt, being cast, because the heir of line was not called, it was found, That he could not be called by a new diligence upon the old summons. Stair, 24th January 1672, Ld. of Lufs *contra* Earl of Nithsdale. *Harcus, (Airs)* December 1687, Ladies Greenock and Mochrum *contra* Erskines. — In a general declarator of a defunct's escheat, it being objected, That the nearest of kin were not called, the Lords allowed them to be cited *cum processu*. *Harcus, (Escheat)* December 1682, Lord Aberdeen *contra* Pitcairn. — In a reduction of a decret of nonentry, on this ground, because the heir of one was not

called who might have defences; the superior offered to produce an execution *cum processu*, which was over-ruled, because the apparent heir ought to have been called, and he could not now be called *cum processu*, the process being ended by the extracted decret. Fountainhall, 19th July 1687, Duke of Hamilton *contra* Countess of Calendar. — The pursuer of an improbation calling for writs flowing from special authors, and the defender objecting, That these authors ought to have been cited *ab initio*, because they might have a defence against taking terms, the Lords found no process, and would not allow the authors to be cited *cum processu*. Marcus, (*Improbation*) February 1682, Lady Hilseside *contra* Baillie. — Yet the officers of state are allowed to be cited *cum processu*. *Ibid.* Duke Buccleugh and Scot *contra* Scot. — In an improbation of a horning it being objected, there could be no process, because the creditor in the horning was not called; it was found, That he ought to be cited, but time was allowed to call him *cum processu*. Fountainhall, 20th January 1686, Baillie and Stewart *contra* Dunbar and Douglas. — Some of the managers of a publick tack for the royal burghs being dead, and the survivors being pursued to compt, but not the representatives of such as were dead; the Lords refused to cast the process on that account, but allowed them yet to be cited *cum processu*, but sisted any further procedure in the cause till that were done. Fountainhall, 20th December 1704, Anderson *contra* Smollet and others. — A female-child who was betrothed to a male about her own age, being pursued in a process without calling her spouse, the Lords repelled the dilatory defence, and sustained process, the pursuer always citing the said spouse and his father as administrator, *cum processu*, by a diligence, and ordained the process to sist in the mean time. Fountainhall, 9th December 1684, Nairne *contra* Lady Nairne.

Production of Titles *cum processu*.

No process was sustained upon a declarator of liferent escheat granted by a Lord of regality, except the Lord's infeftment of the regality were produced *in ingressu litis*; nor was it allowed to the donatar to produce it *cum processu*, altho' it was not his own evident, and the example of a subtacksman pursuing a spuilzie, &c. was urged. Durie, 7th March 1633, Johnston *contra* Ld. Johnston. — Found, That a subtacksman, pursuer of a spuilzie of teinds, may produce the principal tack *cum processu*. Nicolson (*Tack*) 30th March 1622, Cleland *contra* Tenants of Ardbuckle. — In reductions *ex capite interdictionis*, or *inhibitionis*, the interdictions or inhibitions must be produced *in initio litis*, and no term will be given (as for other reasons of reduction) to produce or prove, but the process for want of them will be cast. Durie, 26th March 1636, Lord Torthorrel *contra* Earl of Queensberry. — In a removing, the Lords sustained a *safine* given *propriis manibus*, relative to a contract of marriage, altho' the contract itself was not produced *in initio litis*, the party always producing the said contract *cum processu* before litiscontestation. Auchinleck, (*Safine*) *contra* . — An assignation of a tack of teinds is sufficient to instruct a pursuit for spuilzie of the teinds, the tack itself being offered to be proved *cum processu*. Haddington, 12th

12th February 1610, Murray *contra* Possessors of Turrell. --- A third party being admitted for his interest, the Lords found, That he could not be allowed to prove his interest *cum processu*, but must instruct the same instantly. Nicolson, (*Third Party*) penult. July 1623, Inglis *contra* Stewart. ---- An executor creditor pursuing the defunct's debtors upon his confirmation, need not produce his grounds of debt *ab initio*, it is sufficient he do it before sentence. Spotiswood, (*Testament*) 26th February 1629, Reid *contra* Lochore. --- Contravention being pursued for casting of peats within a man's lands, wherein he alledges himself to be infest, he need not produce his infestment to instruct his summons, but it will be sufficient to prove it *cum processu*. Haddington, 22d December 1609, Corfindae *contra* Asloun.

Making up Titles *ex post facto*.

A RETOUR was drawn back to the date of the summons in favours of an heir pursuing for the heirship-goods. Hope, (*Heir*) 16th December 1619, Strachan *contra* Keith. --- The like in a reduction of a service of terce. Durie, 5th March 1624, Cuninghame *contra* Semple. --- A licence granted to an executor *qua* nearest of kin, was sustained, tho' posterior to the date of the summons. Haddington, 16th June 1610, Wardlaw *contra* Earl Marischal. Spotiswood, (*Commissary*) 20th July 1626, Nasmith *contra* Ld. Possaw. --- A reduction and improbation was sustained at the instance of an heir, tho' he was not entred the time of the citation. Stair, 24th July 1672, Edington *contra* Home. --- The contrary, Marcus, (*Improbation*) November 1687, Earl Airly *contra* Ld. Pitliver. Seeing this privilege is sustained only in removings, and other possessory actions. --- Process was sustained at the instance of an heir of a marriage, he making up his service *cum processu*. Stair, 21st July 1676, Hay *contra* Earl of Twedale. --- The Lords sustained a process, tho' the retour, which was the pursuer's title, was after the summons; because the title was universal, just as they do with an executor, producing a confirmed testament before extract: But if the pursuit be on a singular title, as an assignation; the Lords require, That the title be before the summons. Fountainhall, 30th July 1678, Gun *contra* Sinclair of Southdun. ---- An heir having first raised a process for relief, and after it had depended some years, producing his retour as heir to his predecessor to make up his active title; the Lords found it ought to be received *incidenter* in this process, without obliging the pursuer to raise a new one. Fountainhall, 9th January 1706, Lord Balmerino *contra* Earl of Strathmore.

A MAN retoured to lands before Whitsunday, having warned tenants to remove; the warning was sustained, altho' his sasine was not till after the term, specially where the tenants had no right, and had been tenants to his predecessors. Haddington, 18th February 1606, M'Math *contra* Hewat. ---- Process of removing was sustained at the instance of one, who, by virtue of a precept of *clare constat*, was infest 40 days before the term, tho' not at the time of the warning. Durie, 17th July 1628, Ld. Drumquhaffal *contra* Cleland. ---- In a removing, the pursuer's sasine being long after the warning, tho' the precept of *clare constat* was before it; the Lords found, That a sasine proceeding

upon a precept of *clare constat*, could not be drawn back to the date of the precept, because it has no other warrant but the naked assertion of the superior, which cannot prejudice any third party, it being otherwise in a *fasine* proceeding on a service, which is more publick and authentick. Spotiswood, (*Removing*) 20th January 1625, Elphinston *contra* Guthrie. Hope, (*Removing*) Haddington, 4th March 1623, Stevenson *contra* Stevenson. --- A removing not sustained at the instance of an apparent heir, in respect not only his *fasine*, but his retour was subsequent to the warning. Durie, 14th December 1626, Calderwood *contra* Smith. --- The pursuer's *fasine* being long after the warning, *viz.* not till February thereafter, altho' the retour was prior thereto; the Lords found no process by reason of the length of time; whereas if it had been soon after Whitsunday, or any time before Martinmas, the Lords have been in use to draw it back to the retour, and sustain it. Spotiswood and Auchinleck, (*Removing*) 26th June 1627, Tennant *contra* Auchinleck.

AN apparent heir using the order of redemption, and being thereafter retoured, the Lords drew back the retour to the time of the order, it being but *declaratoria sanguinis*. Haddington, 9th February 1610, Earl Kinghorn *contra* Arburthnot. --- The contrary. Stair, Gosford, 19th January 1672, Lord Lovat *contra* Ld. M'Donald, tho' the apparent heir was infest before he used declarator.

IN a spuilzie of teinds, the Lords refused to sustain an inhibition of teinds used at a man's instance as heir to his grandfire, because he was not served and retoured the time of serving the inhibition. Hope, (*Teinds*) Glendoning *contra* Tenants of Parton.

A CHARGE to enter heir, executed at the pursuer's instance, before he was himself entred heir, was sustained by his subsequent service, which was drawn back to the time of the charge. Haddington, 19th February 1611, *contra*.

THE Lords found no process at the instance of an assigney, because the assignation was dated the next day after the summons, altho' the summons was not signeted for seven months after. Hope, (*Process*) 2d July 1618, Dame Mary Whitelaw and her husband *contra*.

--- One as assigney having insisted against the debtor for payment; it was found no process, because the assignation was posterior to the date of the summons and executions; and tho' the cedent concurred, his concurrence could operate nothing, the summons being in the assigney's name. Stair, Dirleton, Newbyth, 15th November 1666, Abercromby *contra* Anderson. --- An apprising proceeding upon a charge to enter heir, was reduced upon this head, that some of the debts were assigned to the appriser after the date of the charge. Stair, Dirleton, 15th November 1666, Abercromby *contra* Anderson. --- An assigney to divers personal debts, having raised a charge to enter heir, in order to adjudge, before he got the assignations, but the said assignations being prior to the execution; the Lords divided on the question, and the president for the time cast the balance, by finding the adjudication not null, tho' the charge preceeded the assignation, seeing the execution on the charge was posterior. Fountainhall, 11th February 1703, Creditors of Home of Eccles competing. --- It being alledged against a donatary, That a debt pursued for was heretable *quoad fiscum*, and replied, That the pursuer had right thereto as executor-creditor; the Lords sustained process upon that title, tho' supervenient, the testament being

being confirmed after intenting the cause. Dirleton, Stair, 28th November 1676, Ker *contra* Ker. --- A charge against the superior given by an adjudger after intenting a process of reduction, was not allowed to be drawn back to support the process raised without a proper title; for tho' a retour, which is declaratory of the heir's prior right, be in such a case drawn back, this will not apply to a singular successor, who has no right in him but what he acquires after making up titles. Fountainhall, 10th November 1683, Dundas *contra* Wallace. --- The Lords having found in a process of reduction and improbation, That an adjudication, with a charge against the superior, which was the pursuer's title, was not sufficient to cause the defender produce his real rights *quoad* the reduction, but only in the improbation; and the pursuer having, after that interlocutor, procured himself infest, and then insisted, that the defender might take a term; the Lords received the title *hoc ordine*, tho' posterior to the summons, and found no necessity to raise a new process. Fountainhall, 3d December 1695, Keith *contra* Ld. Corbiston. --- A purchaser of a tenement having, upon the foundation of his disposition, raised a declarator of immunity from an alleged servitude, process was sustained, tho' he was not infest till after the date of the summons. Fountainhall, 22d January 1702, Grant *contra* Simpson. --- The Lords sustained a personal bond granted by an apparent heir, as an active title in a reduction and declarator of extinction of debts and deeds that might affect the defunct's estate, the pursuer completing his title by adjudication upon a special charge before he could insist; that is, process was allowed to be carried on without any new citation; and found, That the citation had no force as to other effects, except from the completing of the title. Forbes, 13th March 1707, Robertson *contra* Houston. --- The Lords refused to allow the pursuer of a reduction to repete *incidenter* the proving of a tenor of a writ, necessary to make up his active title. Forbes, 2d July 1709, Inglis *contra* Lord Alexander Hay. --- The like. Forbes's MS. 20th July 1714, Dunbar *contra* Earl of Morton. --- An adjudger having insisted in a reduction of real rights, which he could not do without a charge, the process was cast, and he was not allowed to make up his title *cum processu*. Hargis, (*Improbation and Reduction*) November 1683, Biggar *contra* Dundas. --- There being a reduction raised of a disposition of lands, upon the act of parl. 1621, but not sustained at the instance of the granter's personal creditor; the Lords allowed the process which sifted during the time that the creditor was expediting his adjudication, to go on, after he had obtained and produced it, without necessity to raise a new summons. Forbes, 3d July 1712, Spotiswood *contra* Brown.

In a removing from kirk-lands, the Lords found it sufficient, that the infestment was confirmed after the warning, and before raising the summons, because it was *jus superveniens, quod facit id valere quod prius non valuit*. Spotiswood, (*Confirmation*) 1583, --- Found, That the kenning a lady to her terce is to be drawn back to the time of the warning. Colvil, February 1584, Lady Ross *contra* Tenants. --- She, who during the dependence of her divorcement, made warning, and obtained decret of removing against the possessors of her conjunct-fee lands, charging them therewith, they suspending, her decret will be found null by way of exception, as founded on a warning made when she had no power. Haddington, 26th

June 1610, Coltart *contra* Lady Avandail. — Found, That the donatar to a liferent may warn tenants to remove, even before declarator, which will be drawn back to the date of the gift, and make the warning to convalesce. Haddington, 10th December 1608, Hamilton *contra* Harvie. Haddington, December 1594, Henderson *contra* Ld. Southouse. — The Lords sustained a warning at the instance of a compriser, altho' it was made before she was infest, and that because the superior had been charged upon the comprising before the warning, and she was infest thereupon before Whitsunday, to which term the warning was made. Durie, 10th, Spotswood, (*Removing*) 12th July 1628, Harries *contra* Stuart. Haddington, Hope, (*Removing*) 26th July 1610, Small *contra* Tenants. — In a removing, the Lords found no process upon the warning, because, at the time of making thereof, the pursuer was only superior, and the property was adjudged to him by a declarator of the proprietor's liferent-escheat, obtained long thereafter, which the Lords found could not be drawn back in prejudice of the tenants, notwithstanding it was alledged, That the proprietor was year and day at the horn, long before the warning. Hope, (*Removing*) Haddington, 26th July 1610, Butter *contra* Harvie and his tenants. — A comprising being deduced before Whitsunday, and the compriser having warned the tenants, the warning was sustained in a process of removing, altho' infestment was not taken till after the term. Auchinleck, (*Removing*) 26th July 1627, Ld. Touch *contra* his tenants. — An appriser having charged the superior, pursued a removing; this was sustained, tho' the infestment was after the warning, but superseded removing till Whitsunday, and refused violent profits. Durie, 18th December 1632, Dalrymple *contra* Douglas.

FOUND, That an inhibition raised upon a simple gift of the defender's liferent-escheat, tho' there were neither sentence nor summons raised upon that gift the time of raising the inhibition, was sufficient and warrantably raised, and therefore the Lords sustained an action of spuilzie of teinds pursued thereupon, against the intrometters with the rebel's teinds, he being tacksmen thereof; seeing, after inhibition, the pursuer had obtained declarator and sentence against the rebel. Durie, 12th July 1625, Troup *contra* Lord Harries. — Horning and arrestment upon a bond, by virtue of a general assignation from the creditor therein, not intimated in the cedent's lifetime, without a previous confirmation, was found null and unwarrantable, and the arrestment not sustained to have the effect of an arrestment upon a depending action, altho' the arrester should now confirm the debt. Forbes, 22d February 1707, Jolly *contra* Bethune and others.

AN apprising led upon a decret, defective for want of proof, was yet sustained, in so far as the libel should be instructed, there being no hazard of expiry of the legal, albeit the debate was between two singular successors. Stair, 9th January 1674, Wauchop *contra* Biggar. — This nullity being proponed against an adjudication, That it was led upon a bond of provision, bearing this express quality and condition, That the party should not be liable in payment, unless he actually intromitted with as much of the heretable and moveable bonds disposed to him as would satisfy the sum; yet so it was, that the decret *cognitionis causa* and adjudication had proceeded, without any trial or probation of his intromission; the Lords judged that there was no reason

son to annul adjudications on such informalities, but being restricted to principal and annualrents, they might subsist as a security, tho' accumulations, penalties and termly failzies might be cut off, and therefore, in the present case, they sustained the adjudication so restricted, the adjudger yet proving the party's actual intromissions prior to his decret of cognition, with as much of the bonds as the debt pursued for did amount to, and in case the probation should fall short of that extent, they then reserved to themselves to consider what should be the effect thereof. Fountainhall, 22d November 1704, Liberton and Welwood *contra* Pitcairn and Home. — An adjudication found invalid, because the ground of it was a gift of nonentry, which behoved to have been declared before it could become a liquid debt. Fountainhall, 19th July 1678, Powrie Fotheringham *contra* Marquis of Douglas. — An adjudication led by the Duke of Hamilton, being quarrelled as null and informal by another adjudger, because, *imo*, There being a summons against the defunct debtor's son, containing both a transferring of an act of compt and reckoning against the father, and a charge to the son to enter heir for payment of the debt libelled in the principal summons, and the son having renounced to be heir, the pursuer took out a decret *cognitionis causa* for payment, without extracting a distinct sentence of transference, as he ought to have done. *2do*, The decret was extracted upon a licence to pursue, without confirming the debt, whereas the licence was conceived *excludendo sententiam*. Answered, The diligence is formal, in so far as, *imo*, The same hath proceeded upon a sentence, both in the transference and *cognitionis causa*, and the Lords use not to loose adjudications upon such a nicety. *2do*, It is only the interest of the commissaries to quarrel the not confirming before extract, and the Duke could not confirm, not knowing if he would recover payment by the diligence, but, upon payment, he is content to confirm and grant discharge. The Lords would not annul the Duke's adjudication, but allowed the pursuer to debate against the debt and grounds thereof, and sustained the adjudication only *in quantum* the debt adjudged was not cancelled, and declared it current and redeemable. Marcus, (*Comprisings*) March 1686, Children of Bangour *contra* Duke Hamilton.

In an action of mails and duties, at the instance of a donatar of forfeiture, it was objected, no process till the gift be declared; the Lords allowed declarator to be raised *incidenter* in the present process. Marcus, (*Forfeiture*) March 1683, Lord Livingston *contra* Gordon.

COMPARE Litigious.

Quod potuit non fecit.

AN interdicted person having alienated lands, warrandice was not so much as sustained to take effect against his person or moveables; because if the deed was null *quoad* the granter himself, he could not be bound to warrant it. Maitland, 10th April 1559, Stewart *contra* Moubray. — A disposition of an heretable subject being found null, as granted on death-bed, the disponsee insisted against the executor for the value, *imo*, Upon the obligation of warrandice, which was good

Right ineffectual as to the subject conveyed, if it will found a claim for an equivalent?

against the defunct, consequently good to affect the dead's part. 2do, Seeing people are not supposed to act without meaning, especially in executing formal deeds, the disposition, which the granter foresaw might prove abortive with regard to the thing principally intended, must imply an assignation to an equivalent out of the dead's part; as if the granter had adjected to his disposition, *That in case the heir should quarrel the same upon death-bed, the obligation of warrandice should be effectual against his moveables.* To the 1st answered, A disposition on death-bed is ineffectual even *quoad* the granter himself, consequently he is not liable in warrandice, and as little his representatives. To the 2d answered, When a deed is null for want of power, there is no presumption that the granter so much as intended an equivalent within his power, especially in the present case where the defect of power could not be known when the deed was granted; for here the maxim obtains *quod potuit non voluit.* 2dly, *Esto* he had intended an equivalent, not relevant, unless he had expressed the same in some proper writing, *quod voluit non fecit.* The Lords found, That the deeds on death-bed, relating to heretage, cannot affect the executry, either as a debt or a legacy. Dirleton, 12th, Gosford, 23d, Stair, 26th November 1674, Paton *contra* Stirling. Fountainhall, 22d November 1698, Cuming *contra* Cuming.

A GRATUITOUS bond granted by a minor being revoked and reduced by his heir, the creditor insisted for an equivalent out of the executry; upon this footing, that the bond implied a legacy, which the minor could grant, minors being *testamenti capaces.* Answered, The bond being reducible by the granter himself, it can infer no warrandice against him or his goods, neither can it have the effect of a legacy; for whatever might have been the granter's intention, he has not expressed the same either by word or writ, *& sic quod voluit non fecit.* The Lords found they could not transubstantiate the bond into a legacy, and therefore affoizied. Fountainhall, 15th December 1698, Straiton *contra* Wight.

A WRITTEN testament being reduced for informality, the Lords refused to sustain it as a nuncupative legacy. Forbes, 20th July 1711, Moncreif and her husband *contra* Monipenny.

*Legatum rei
alienae.*

HEIRSHIP moveables being left by way of special legacy in a testament, the Lords found, That neither the subject nor price thereof was due, and that it was not to be looked upon as *legatum rei alienae scienter legatae*, but as a deed utterly null, seeing heretage can neither be disposed of on death-bed or by way of testament, tho' in *liege poustie*; for here the executor and universal legatar was not burdened *per damnationem* to make the legacy effectual, which would have been the case of a *legatum rei alienae scienter legatae.* The special legacy was left in no other shape than as excepted out of the executor's right *finendi modo*, and implied no other obligation upon the executor than a *non repugnantia*, and so *quod potuit non voluit.* Maitland, 7th February 1566, *contra* . --- A special legacy in a testament being made in the form *per damnationem*, *I ordain my executrix to confirm the bond of 800 merks due to me by, &c. and to convert the same to the use of Grisel Edmondston*; and the bond having been afterwards rendered heretable by a supervenient security, the executrix was found not obliged to give an equivalent out of the other effects; for here

here the will of the defunct went no further than to prefer the legatar to the executrix as to the bond in question ; and as at the date of the testament, the testator's will was capable of receiving effect in the precise terms thereof, there could be no place for any implied meaning; *& sic quod potuit non voluit.* Stair, 8th July 1673, Edmondston *contra* Primrose. ---- But a special legacy of an heretable bond being left in a testament, in which the testator's heir was named executor and universal legatar, the legacy was sustained ; for it implied a *non repugnantia* upon the heir : So that he could not quarrel the special legacy, and at the same time take the benefit of the testament. Stair, 2d December 1674, Cranston *contra* Brown. — The like was found with regard to a special legacy of a bond, which had been assigned by the testator to the executor himself, who being by the same testament made universal legatar, it was found, That he could not quarrel the special legacy, or seek to be preferred in virtue of his assignation, unless he would renounce any benefit he could have by the testament. Stair, 24th June 1664, Falconer *contra* Dougal.

A THOUSAND pound being left in legacy, and appointed to be paid out of the first end of a debt due to the testator by one of his debtors, which debt was found to be heretable ; the executor notwithstanding was found obliged to pay the legacy, seeing it was a general legacy, and the appointment to pay it out of the heretable subject was understood to be demonstrative only, and not taxative. Spotiswood, (*Legacy*) 1623, Durie, 22d January 1624, Drummond *contra* Drummond. — A woman in her testament left a legacy in the following terms, *I leave to James Murray 600 merks, whereof 200 merks in his hand, due to me by bond; which bond I ordain to be delivered up to him, and four more to be paid :* The bond had formerly been uplifted by the husband of the testatrix, to whom it fell *jure mariti* ; yet as this was truly a general legacy of 600 merks, and the adjected clause appointing only the manner of making it effectual, and not being taxative, the Lords found the whole 600 merks due. Stair, 16th June 1664, Murray *contra* Executors of Rutherford. See *Clause § Taxative or Demonstrative.*

A DEBITOR having granted two infeftments of annualrent, did thereafter accumulate the principal sum and annualrents of the first infeftment into a principal sum, and disposed the property in security thereof ; the second annualrent was found preferable to this corroborative security, tho' it was argued, that no more was obtained thereby than if an apprising had been deduced upon a poinding of the ground ; and the debtor having voluntarily granted security to prevent apprising, it should work the same effect as if an apprising had been led. Stair, 13th, Gosford, 16th February 1669, McClellan *contra* Lady Kirkcudbright. ---- The like. Stair, 8th July 1675, Scrimzeour *contra* Earl Northesk.

A conveyance per ambages, may be effectual, where it will not answer directly done.

COMPARE *Implied Assignation, Implied Obligation.*

RANKING and SALE.

In what cases can a legal sale take place?

IN the sale of the estate of Hallgreen, compearance was made for Burnet of Montboddo, who had purchased a part of the debtor's lands long before the bankruptcy, and had applied the price to purge incumbrances; but had neglected an investment of annualrent preferable over the lands sold, as well as over those remaining with the common debtor; it was pleaded for him, That his lands ought to be struck out of the sale, seeing his case could not be reached by the act of parliament, being neither debtor nor bankrupt. Answered, That *quoad* the annualrenter, the lands must be held as belonging to the bankrupt. Replied, The annualrenter may indeed follow forth his diligence by pointing the ground, which is all he is entitled to by the nature of his right: In this case, the annualrenter is in no worse situation than if his own debtor were not bankrupt; and there is no reason he ought to be in a better, which he would be, upon supposition he could sell the lands upon his debtor's bankruptcy; for no doubt he can bring them to a sale upon Montboddo's bankruptcy. The Lords found the lands purchased by Montboddo cannot be exposed to sale with the rest of Hallgreen's lands, but prejudice to the annualrenter to affect Montboddo's lands as accords. 24th January 1733.

What understood bankruptcy?

IN a question, whether an estate could be reckoned bankrupt, when there were five parts of six of the price put upon it by the Lords due to creditors, so that there was only a sixth part of surplus; the Lords thought, that such a man was in the construction of law insolvent, since it is naturally impossible for him to pay this debt out of the estate any other way than by selling his lands; for after deduction of publick burdens, dead, waste and poor, with other casualties and accidents, it will do little more than pay the annualrent of the debt, and so can never diminish any part of the principal sums, nor pay the debt, without exposing the lands to sale; and therefore found, That in this case the debtor was *obraratus* and insolvent, and the estate bankrupt. Fountainhall, 3d July 1705, Hope *contra* Garden.

Liferents how computed?

THE liferent escheat of a father and of a son being gifted, and the donatory pursuing a sale of the estate, it being burdened, the Lords modified the father's liferent at four years purchase, being aged 70; and the son's at 6, he being about 40. Fountainhall, 9th July 1709, Creditors of Ogilvie competing.

Form and steps of this process.

IN the roup of a bankrupt estate, the Lords found, where the parties had neglected to give the Lords overseers of the roup timeous advertisement of the diet, so that they were both absent, tho' the clerk had continued the court to a short day, yet that this adjournment had no warrant, and therefore that they must either upon the old or a new diligence cite the creditors over again, and use the other solemnities at the mercat cross and parish church doors; for tho' this protracted the affair, and put them to greater expence, yet it being the foundation of the offerers security, all must be orderly done, and an adjournment, without the judge's express warrant, could not supply it; tho' in ordinary

nary proceffes the diets are not peremptory, but with continuation of days, and summonses are called by the clerk alone, in order to seeing or continuing, without the judge's prefence. Fountainhall, 4th June 1696, Allan *contra* Belshes.

THE Lords, in a procefs of fale of a bankrupt estate, having (after probation led) fixed the price at 19 years purchafe, and none offering to buy at that rate, because of some inconveniencies that attended the lands, their Lordships, upon the creditor's petition, having found the division of the lands among the creditors impracticable, did therefore abate the price to 18 years purchafe, but, for intimation to the lieges, they ordained new letters of publication to be executed before the lands should be again exposed to fale at this new price. Forbes, 7th, Fountainhall, 8th, July 1709, Creditors of Cleland supplicants.

THE ranking and fale of a bankrupt estate being far advanced, and the subject lying near to the head-burgh of a regality, and all the creditors dwelling very near to it, yet the Lords refused the desire of their bill, craving, That the roup might be at the said burgh, before the bailie of the regality, or any other their Lordships should appoint to oversee it. Fountainhall, 22d February 1712, Creditors of Colquhoun and Wardrop supplicants.

AT a judicial roup of a bankrupt estate, the Lords refused to allow any thing for the house and gardens. Fountainhall, 9th December 1685, Earl Mar *contra* Lady Cardross. The rental how made up?

A BILL being presented by the creditors upon a bankrupt estate, shewing, That besides what their debtor had in property, he had also an heretable right on another man's lands, but had still been excluded from possession by other preferable rights, which, as he contended, tho' they were near paid by intromission, yet this being dubious, and what might hinder the fale of his uncontroverted property, if exposed with it, therefore craving that it might be left out of the roup; the Lords, tho' the act of parliament ordains the bankrupt's whole estate to be roup'd, yet thought that this could only be understood of his clear liquid and undoubted property, and not of uncertain claims and claspers, which he might have on other mens estates, therefore they allowed the roup to go on without including those lands, or else that they might be exposed to fale separately by themselves. Fountainhall, 22d February 1712, Creditors of Ramsay supplicants. If a bankrupt estate may be fold in parcels?

A PURCHASER of an estate at a judicial roup, having afterwards discovered divers material errors in stating of the rental and price, and craving rectification of the same, and allowance and deduction conform, the Lords refused to review any errors in the testimonies of the witnesses or the probation; but if there was any material error *in calculo*, or as to the application of the probation, they inclined to reconsider the same, as where a house is given up as holding of the debtor, and thereafter proved to hold of another, &c. Fountainhall, 20th July 1697, Ld. Drummelzier and Aikenhead supplicants. — After the proof of the rental was fixed, a tenant having quitted his possession, and the Lords factor having set the same, at a publick roup, L. 100 down of the proved rental, after intimating the same in the Gazettes and at the adjacent parish churches, but without applying to the Lords Whether understood a lump bargain or by a rental.

for a warrant, which regularly ought to have been done, whereby it happened that the lands were exposed to sale at the proved rental, and having been bought at 27 years purchase, the purchaser, when he came to understand that the judicial rental was erroneous, insisted for a proportional abatement of the price; and here it was not alledged but that the factor had set the room at the true worth, and L. 100 yearly was a considerable article in an estate of 2000 merks a year. The creditors, who were his parties, pleaded, *1mo*, That sales before the Lords are of the nature of lump bargains, where the rule is, *ut caveat emptor*. *2do*, If they are understood as sold by a rental, the proved rental is the rule; to fortify which, the decision of the creditors of Hallgreen was cited, 15th January 1725, where the Lords found, in general, That the purchaser can have no deduction from the proved rental by the rents falling lower, after the probation and before the sale. To the first it was answered, That publick sales are plainly by a rental; the first step taken is to fix the rent, the next to fix the number of years purchase the lands may be worth. To the second, The proved rental is indeed the rule, but still upon supposition, that it is the true rental at the date of the purchase: And truly selling by a rental implies as much; for what has the purchaser ado with any but the present rental? This is plainly the case of private sales, and no good reason can be given to difference publick sales. The Lords found, That the purchaser is not intitled to any abatement of the price on account of any diminution of the rental betwixt the time of the judicial proof of the rental and the purchase. 22d December 1732, Cockburn of Cockpen *contra* Creditors of Cockpen.

Purchaser
must find cau-
tion for the
price.

AN apparent heir preferred as the highest offerer, in an action of sale and roup of his predecessor's lands, was found not exempted from finding caution to make the price forthcoming to the creditors, altho' the purchaser alledged, That the term was circumduced against all the creditors except two, whose debts exhausted the price, and these he had got assigned to him, but no real diligence had been used for these debts. Forbes's MS. 10th November 1713, Sym supplicant.

Decreet of
sale, if it give
absolute secu-
rity to the
purchaser?

AN estate having been sold at a publick roup for the debts of the liferenter, by an alledged collusion betwixt him and his creditors, during the infancy of his son the fiar, who thereafter brought a reduction and improbation to set aside the purchaser's title to the estate, as acquired *a non domino*, without authority of the acts of parliament, which give no power to the court of session to sell one man's estate for paying another man's debt; the Lords found the decreet of sale was a sufficient production made for the purchaser to exclude the pursuer's title. 21st June 1720, Coupar *alias* Chalmers *contra* Sir Andrew Mireton of Gogar.

Decreet of
sale does not
loose the real
debts and di-
ligences, until
the price be
paid.

A PUBLICK sale does not purge the estate of the debts and diligences affecting the same, these remain a burden upon the estate until the purchaser make payment of the price. 24th July 1739, Donatar of Ward *contra* Creditors of Bonhard.

EXPENCES of ranking and sale, who liable? See Expenses.

RECOGNITION.

RECOGNITION.

RECOGNITION takes place in taxward as well as simple ward. In what holdings takes place?
 Stair, Gilmour, 5th February 1663, Lady Carnegie *contra* Lord Cranburn.

RECOGNITION is not incurred, unless the major part of the ward-fee be alienated by deeds consisting together at the same time. Incurred by alienation of the major part.
 Stair, 23d February 1681, Hay *contra* Creditors of Muirie. Home, March 1683, King's Advocate *contra* Creditors of Cromarty.

THE Lords found, That in computing recognition, all such lands are to be understood as are in one infeftment and under one duty, tho' not united. What if the lands be discontinuous?
 Colvil, February 1590, Lord Lindsay *contra* Hamilton. — Discontiguous lands being all contained in one charter, bearing one *reddendo*; it was pleaded, That the major part of the whole must be alienated to infer recognition of any part. Answered, Lands are united, either naturally, when contiguous, or civilly, when discontinuous; lands are united by a formal clause of union into one barony or tenement, and the charter in question containing no formal union, but only a dispensation to take off the necessity of several sasines in the discontinuous parts, recognition is to be inferred from a disposition of the major part of each of these contiguous parcels. The Lords found, That the dispensation for taking sasine at one place, and the *reddendo* of one duty in the charter of resignation, does not import a civil union of the discontinuous tenements, which therefore are to be considered as *distincta tenementa*, so as alienation of the major part of each does recognise that tenement only. Marcus, (*Recognition*)
 March 1683, Hay *contra* Creditors of Muirie.

AN infeftment of annualrent, above half the value of the lands, was found to infer recognition for the first time, it having formerly been otherwise determined, because the vassal was not changed, which was thought the great cause of this penalty. What sort of alienation infers recognition?
 Maitland, 17th March 1569, Balfour *contra* Balfour.

AN infeftment for relief of cautionry, being only conditional in case of distress, was found not to be like an infeftment of annualrent for a pure debt, to be computed as an alienation for the full sum in the bond, unless distress had followed; and the cautioners having paid the sum, and taken assignation, without distress, made no difference; but found, That it might be conjoined as a conditional distress by hazard; so that, for instance, if the half of the fee be alienated, such an infeftment for relief might be computed at some certain value to infer an alienation of the major part; for the Lords thought, That even a wadset, tho' of the whole barony, if there was a backtack for payment of the annualrents, would not infer recognition, unless the sum exceeded the value of half of the barony. Stair, 7th July 1681, Hay *contra* Creditors of Muirie. — But infeftment for relief, bearing, That the cautioner was distressed; and therefore disposing for his relief, declaring his entry to be at a certain term, and that he should apply his intromissions towards payment of the debt; was found a sufficient ground

of recognition *quoad valorem* of the sum. Falconer, Home, Marcus, (*Recognition*) 15th March 1683, *inter eosdem*. — A wadset of ward-lands for a small sum, under the value of the half, was found to infer recognition, in respect the property of the whole was disposed; and herein it differs from an annualrent, which is but a servitude upon the property, and therefore can only be considered with respect to the value of the burden. Marcus, (*Recognition*) March 1683, Earl Aberdeen *contra*.

— In a declarator of recognition of ward-lands, which were wadset with a back-tack, for a sum under half the value; alledged for the defender, That till the backtack be declared void, and brought to the case of a proper wadset, the backtack-duty only is to be considered as the burden. Answered, 'Tis the vassal's contempt in disposing the whole lands, and not the value of the backtack-duty that infers recognition. The Lords repelled the defence. Marcus, (*Recognition*) June 1687, Littleden *contra* Law. — A wadset being granted of several distinct tenements, one of which held ward, the ward-lands were found to recognise, tho' the other subjects were of more value than the wadset sum. Marcus, (*Recognition*)

February 1683, Donatar *contra* Creditors of Cromarty. — Redeemable rights, tho' the debt be paid before the concurrence of other alienations, yet if not actually renounced, do come *in computo* to make up a major part, and to infer recognition. Marcus, (*Recognition*)

February 1683, Donatar *contra* Creditors of Cromarty. — In a question, Whether base infeftments, long since prescribed, so that the debt could not be exacted, might, nevertheless, concur with others which were not prescribed, to make the lands recognise; the Lords found, That, notwithstanding the prescription, they might concur, the last ground being within 40 years; for they found, That the debt might be extinct as to the effect of execution, and yet not as to the casualty of recognition, for *contra non valentem agere, non currit prescriptio*; but so it is, that the feudal delinquency of recognition is not incurred till the major part of the barony be alienated by base infeftments. Now, supposing the last base infeftment to be within 40 years, and every one of the grounds and steps, which make up the recognition, being supposed to be within 40 years of each other, the action could not exist till the half, and a little more, were alienated, and so could not begin to prescribe till then, since *actioni nondum natæ non prescribitur*. Fountainhall, 3d and 4th February 1686, Creditors of Dundee *contra* Earl Lauderdale. — The like. Forbes, 25th July 1712, Moncrief *contra* Heirs of Ballo.

What if the alienation be null or reducible?

SASINES, which are intrinsically null, as wanting essential solemnities, are not to be respected as grounds of recognition. Home, March 1683, King's advocate *contra* Creditors of Cromarty.

WITH regard to an infeftment *a me* to be holden of the superior, it was objected, That the same could not infer recognition, being null till confirmation. Answered, The vassal here has done *quantum in se erat*, nor can the implied condition *si dominus consenserit* be understood suspensive, where possession is directly given by the sasine; and if it be understood a resolute condition, it does not stop the alienations. The Lords repelled the objection. Stair, 5th February 1663, Lady Carnegie *contra* Lord Cranburn.

R

A DISPOSI-

A DISPOSITION failing heirs-male of the granter's body, with *sa-* fine upon it, was found to infer recognition; because the precept directed to give present state and *sa-*fine, and so this could only be understood to have the import of a resolute condition, in case of the after-existence of heirs-male. Stair, 30th January 1663, Lady Carnegie *contra* Lord Cranburn.

RECOGNITION found incurred by alienation of the fee, tho' the same was afterwards reduced, as having been obtained by circumvention: Whence it was argued, That the alienation was not so deliberate as to infer the severe penalty of recognition. Stair, 29th July 1672, Lord Halton *contra* Earl of Northesk.

IN a declarator of recognition upon a base infeftment, it being alleged, That a father had conveyed his estate to the son of the eldest of his three daughters, who was therefore *alioqui successurus*; the Lords found this sufficient to assilzie from the recognition *in totum*, notwithstanding the existence of the two other sisters. Fountainhall, 17th March 1687, Forbes *contra* Thoirs. --- The Lords found an infeftment granted by the goodfire to the grandchild, with consent of the son, to be a cause of recognition, because the grandchild was not immediately to succeed. Haddington, Hope, (*Recognition*) 28th February 1612, Rae *contra* Ld. Kellie. --- Recognition was found incurred by a disposition to the vassal's own grandchild who was not apparent heir at the time, tho' afterwards, by the death of an elder brother, he became apparent heir. Stair, Gilmour, 5th February 1663, Lady Carnegie *contra* Lord Cranburn. --- Altho' recognition takes no place where the alienation is in favours of the nearest heir, yet a brother was not counted nearest altho' the party wanted children, because he was *in spe* to have them, being young and married. Spotiswood, (*Recognition*) Colvil, December 1591, King's advocate *contra* Earl Cassils. --- Recognition was inferred, tho' the disposition was in favours of a nephew, he not being *alioqui successurus*, his father being alive, and because the granter might have had children. Stair, 29th July 1672, Lord Halton *contra* Earl of Northesk. --- A wife in her contract of marriage disposing ward-lands to her husband, his heirs and assignies, infeftment taken thereon infers recognition. 14th January 1725, Hall *contra* Craw. --- Recognition was inferred by a disposition to an apparent heir, conveyed by him before infeftment to strangers. The difficulty was, That the disposition to the son could not infer recognition, being to one *alioqui successurus*, nor that to the stranger, the son not being vassal. Stair, 15th July 1674, Lord Lyon *contra* Forbes. --- The like. Fountainhall, 22d July 1680, Buchan *contra* Buchan.

What if the alienation be *intra familiam*?

WARD-LANDS being disposed during the usurpation, at which time the law of recognition was not in force, were yet found to be recognised after the restoration, in respect that confirmation from the King was not demanded. Gosford, 14th, Stair, 15th December 1669, Pitrichie *contra* Ld. of Gight. --- The like. Stair, 12th February 1674, Viscount of Kilsyth *contra* Hamilton. Stair, 7th January 1676, Cockburn *contra* Cockburn. --- The Lords sustained all base infeftments after the 12th of April 1654, (the date of the Usurper's ordinance about ward-lands) as lawful, and not to be the ground of recognition,

Alienation during the usurpation.

cognition, unless the vassal continued after the King's restoration without demanding confirmation. Marcus, (*Recognition*) July 1687, Earl Lauderdale *contra* Vassals of Dundee.

With what
burdens do the
lands recog-
nise ?

THE smaller servitudes are sufficiently constituted by prescription, so as to be effectual against the superior, to whom the lands return by recognition. Stair, 26th January 1681, Edie *contra* Thoirs. — Recognition having been found incurred, but the relict alledging, That she had a right of liferent contained in the first infeftment of these lands granted to her husband, whereby he acquired those lands to himself, and her the longest liver of them two, and whereon they were publickly infeft; the Lords sustained this infeftment to continue her liferent. Fountainhall, 14th February 1678, Arbuthnot *contra* Straiton.

EFFECT of novodamus, confirmation, resignation, to bar recognition. See *Implied Discharge*.

FEU in what case it bars recognition. See *Feu*.

R E C O M P E N C E.

If he can be
made liable
whose benefit
was not in-
tended ?

A PARTY having furnished corn and straw to a rebel for entertainment of his cattle, was found to have no claim against the donatar of escheat, tho' the only person who was benefited thereby, in regard the furnisher followed the faith of the rebel only, without any view to benefit the donatar. Dirleton, 12th June 1667, Lumisden *contra* Summers. — No law subjects a man to recompence or remuneration who reaps an occasional or consequential benefit from the deed of another, done with no view to his interest; and therefore in a competition of creditors upon a tenement built by the common debtor some short time before his bankruptcy, the tradesmen and furnisher of materials were found to have no preference, because they followed the faith of the common debtor allennarly. 4th December 1735, Burns *contra* Creditors of M'Clellan.

No reimbursement can be craved from the intrant minister for meliorations of the glebe made by his predecessor. Nicolson, (*Kirkmen*) 14th June 1623, Dunbars *contra* Hay.

A DEFENDER'S right to a tenement being reduced, it was found he could have no remuneration for expences he gave out to keep the tenement in good condition before his right was reduced, because during that time he enjoyed the mails and duties; but that he had a claim for such meliorations as were profitable to the pursuer, by raising the rent of his tenement. Stair, 18th January 1676, Binning *contra* Brotherstones.

A TACKSMAN of a house has no claim for what he builds or repairs, unless the same be conditioned in the tack. Gilmour, February 1664, Hodge *contra* Brown. — A tackfman, after being dispossessed by letters of ejection, continuing to sow the ground, the

the Lords found that the corns did belong to the proprietor, upon this principle, That *sata cedunt solo*; but they decerned him to pay the expence of labouring and seed, as being *eatenus locupletior factus*, tho' the corns, as said is, were sown *mala fide*, and without any intention to profit the proprietor. Stair, 22d February 1671, Gordon *contra* M'Culloch.

THE Lords sustained action at the instance of a wadsetter, for declaring that the reparation of a harbour in the wadset lands to be made by him was profitable to the reverser, who should be obliged to re-found to him the expences thereof before redemption of the lands; but here there was no compearance for the defender. Durie, 22d July 1626, Morison *contra* Earl Lothian.

Supposing
the intention
of benefiting,
in what cases
recompence
due?

A GENTLEMAN incumbered with debts, having conveyed his effects to certain trustees for the use and behoof of his creditors, and they having accordingly entred upon the management, and converted the effects into money, in a compt and reckoning betwixt them and the creditors, the Lords found, That trustees are not intitled in law to demand any fee or reward for their pains. 4th January 1738, Trustees of Colonel Johnston's creditors *contra* the creditors.

IN a pursuit for merchant goods taken off in name of the defender, and applied to his use, the defence was, *Non relevat*, unless it could also be alledged, that the defender gave commission to take these goods off in his name; for otherwise there was no contract betwixt the pursuer and defender; and if the mandatar, who was employed to furnish him upon his the mandatar's own credit, used his name without authority, the merchant who gave trust has himself to blame; it was found, That the goods being acknowledged converted to the defender's use, he was liable to the pursuer, in so far as he proved not that he paid the mandatar. Stair, 20th February 1669, Bruce *contra* Ld. and Lady Stanhope. — In the like case, the Lords would have sustained it relevant to affoilzie the defender, that the goods were gifted to him by the person who took them off for his behoof; but as *donatio non præsumitur*, he was found liable, in respect he could bring no evidence of the alledged donation. July 1726, Hathorn *contra* Urquhart.

A WOMAN having consented to her second husband's selling her jointure, which she had by a former, and judicially ratified the same, whereby she was lesed, the second husband having left her nothing in lieu thereof; in a process at her instance against the said second husband's children of a former marriage, for an equivalent, she having revoked her consent, as being *donatio inter virum & uxorem*; the Lords found, That such a revocation could not prejudice him who bought her jointure; but seeing the writ bore, thar her husband received the price, they thought it reasonable, that she should be indemnified by an equivalent remuneration out of his estate. Fountainhall, 16th July 1696, Leishman *contra* Nicols. — A wife having a liferent, constituted by locality, was induced to consent to several heretable debts, contracted by her husband, whereby her liferent, after his death, became in some measure ineffectual; upon this the question arose, Whether the relict had recourse against her husband's heir, in so far as she was prejudged, by yielding preference to her husband's creditors? That a recourse was competent, was argued from the nature of the transaction, that, by the wife's consent to the creditors their preference, no

simple or absolute gift was designed, either to the husband or his creditors, that nothing was intended further, than to grant a security to the creditors, it was the same with respect to the husband, whether this was done, as in the present case, by consenting to a preference, or if she had directly impignorated her liferent-lands; and therefore, from the nature of the thing, that recompence is due. The Lords found, That the liferentrix had a competent action against the heir of the husband for the damage she sustained for the want of her liferent, by consenting to her husband's creditors. 29th November 1728, Trail of Sabae *contra* Moodie.—The like. Stair, 11th January 1679, Bowie *contra* Corbet.

If one pay anothers debt, without intention of benefiting him?
A WRITTEN testament being reduced for informality, the Lords allowed the executor nominate the ordinary expence of confirming the testament, in so far as it was profitable to the executrix *qua* nearest of kin, pursuer of the reduction. Fountainhall, 20th February, Forbes, 20th June 1712, Moncrief *contra* Monipenny. — A person in his testament, having ordained a monument to be built to him by the executrix therein named; the Lords allowed her deduction of the expence thereof in a compt and reckoning at the instance of the defunct's nearest of kin, who had reduced the testament, altho' before commencement of the building the reduction was raised, and the executrix got a bond from the heir to relieve her of the expence thereof, in case the testament should happen to be reduced; but the Lords refused her allowance for the expences of defending against the reduction thereof. Forbes, 19th February 1712, Moncrief and her Husband *contra* Monipenny.

In an action at a tercer's instance for a third of the mails and duties of the lands, since her husband's decease, intromitted with by the fiar; the Lords refused to allow defalcation of a third of the chamberlain's fee paid by the defender, tho' it was alledged, that if she had managed it herself, she could not have done it without expence. Durie, 27th March 1634, Lady Dunfermline *contra* her Son.

A PARTY having uplifted the defunct's rents, and applied the same for defraying the expences of the funerals, it was found, That he, having done the same by the relict's order, was to be considered as her hand; and therefore that he was liable to accompt to the heir for his intromissions; seeing, if the relict were pursuing for an exoneration upon this head, it would be competent to object to her, that she had in her hands the defunct's moveables, which ought to be applied, in the first place, towards defraying the funeral expences. Home, 21st June 1726, Sir William Johnston of Westerhall *contra* Marquis of Annandale.

Expences laid out in re communi.

THREE persons having joint-right to a mill, did all concur in a declarator of thirlage, and two of them gave commission to the third to borrow money upon their joint credits to carry on the plea; after it was come a considerable length, these two gave in a disclamation of the process; and the third continuing to carry it on in his own name, did, at length, obtain decret of declarator; in a pursuit against the other two for their share of the expence the Lords found them liable for the expences, necessarily expended to the end of the plea, the mill being a common and indivisible interest. Stair, 6th January 1676, being

Forbes *contra* Ross and Paterson. ---- One of many creditors pursuing the common debtor's relict (as having got a disposition from her husband, in trust, for payment of his debts) and recovering sentence against her, but nothing thereon being extracted, and the other creditors thereafter compearing, the said first creditor was found preferable for his expences, to be paid out of the first and readiest of the subject, but the whole creditors were found to come in *pari passu*. Bruce, 30th July 1715, Creditors of Calderwood *contra* Borthwick.

AN appriiser of a burnt tenement, upon which a liferent was constituted after it was burnt, having, after expiry of the legal, rebuilt the same; it was found, That the liferenter might either have what the burnt tenement was worth before the rebuilding, or otherwise the possession, *quia inedificatum solo, solo cedit*, she paying, or allowing out of the duties the annualrent of what was necessarily and profitably wared thereon at her option. Stair, Gosford, 24th January 1672, Hacket *contra* Wat. --- A relict being infest in a ruinous tenement, repaired the same, and built it much better than ever it was; the heir was decerned to refund her expences, not only in so far as necessary, but in so far as he should be a profiter by greater mail after the relict's death, she leaving the tenement in as good case as at the time of the pursuit. Stair, 23d February 1665, Jack *contra* Pollock. --- A widow having rebuilt her jointure-house, burnt *casu fortuito*, was found to have no action against the heir, unless the house had been accustomed to be set for mail, and, in that case, found the heir liable *in quantum lucratus*. Stair, 2d February 1672, Guthrie *contra* Ld. M'Kerston. --- The Lords found the fee of a burnt tenement, repaired by the liferenter, affected with the principal sum expended on the reparation. Forbes, 20th February 1706, Hallyday *contra* Garden. --- But refused to find the fee burdened with annualrent of the reparations during the liferenter's lifetime. Forbes, 17th February 1708, Hallyday *contra* Cuninghame.

A SKIPPER, to preserve his ship from being carried off, having struck a hole in her bottom, which, afterwards, by stress of weather, proved the destruction of the ship; he was not found to have any action for recompence against the merchants, because it was not done for the common utility, and could only save the ship, and not the goods, to which the privateer had free access. Stair, Fountainhall, 15th January 1680, Leslie *contra* Logan. --- A party found liable for his proportion of the average, the ship being taken by privateers, and the supercargo kept for the ransom; and thereafter paying it, the said party's goods being saved and delivered to him. Fountainhall, 29th June 1710, Richie *contra* Lord Salton. --- In a shipwreck, part of the cargo being saved and fished out of the sea, the goods were delivered to the freighters upon payment of the salvage; in a pursuit, afterwards, at the instance of the owner of the ship, against the freighters, for a proportional part of the freight, effecting to the goods saved, a counter claim was reared up by the freighters for a proportion of the salvage effecting to the pursuer's claim for freight, which it was contended they ought to be liable for, in respect if no goods had been recovered, no freight would be due. Answered, The salvage is no *commune negotium*, the labour and expence being entirely bestowed upon saving the goods, without any other supposed view; 'tis true the owners of the ship reap a consequential benefit by saving the goods, in being entitled

to the freight, which otherwise they could not claim ; but expence laid out in saving and preserving of any thing, follows the proprietor only, even where others reap a casual or consequential benefit thereby. The Lords found the full freight due, without any deduction upon the account of salvage. 18th January 1735, Lutwidge *contra* Gray.

Parents when
liable for fur-
nishing to
their children ?

THE Lords sustained action for meat and clothing to a minor, tho' it was alledged, that he had sufficient allowance from his father the defender, and this, in respect it was done abroad, where he was far from his friends. Spotiswood, (*Minor*) *penult.* February 1624, Creech *contra* Walker. — A father who gave money to his son to furnish himself, was not found liable for merchant goods taken off by the son without his concurrence. Stair, 20th January 1672, Wallace *contra* Crawford. — The husband's father found not liable for goods taken off by the wife during the marriage while they remained in family with him, in respect he the father had been at considerable charges upon them *aliunde* suitable to their quality. Marcus, (*Stante matrimonio*) November 1682, Alston *contra* Stamfields. — A father is not bound to provide his daughter with wedding-clothes, and therefore was found not liable where the wedding-clothes were not furnished upon his faith. Stair, 10th July 1672, Neilson *contra* Guthrie. — The father is primarily liable for wedding-clothes furnished to his daughter, because he is bound to provide for her, and therefore the furnishing presumed given upon his faith. June 1730, Fergusson *contra* Muir.

In what ca-
ses the chil-
dren liable ?

A YOUNG woman to whom a merchant furnished abulziements in her father's lifetime, altho' she was major, was yet affoilzied, because *in familia*. Colvil, Anderson *contra* Craig. — The Lords refused to sustain action against a minor *in familia paterna* for clothes furnished to him, his father at and before the time of furnishing being in use to take off for him such things, wherefore the pursuer was left to convene the father *prout de jure*. Durie, 22d February 1623, Lamb *contra* Tweedy. — In a reduction of a bond granted by a minor upon lesion, the bond being for marriage-clothes, the Lords found, That what was given to the bride's father imported lesion, and therefore reponed the minor against the same ; but what was given to the bride herself, tho' prior to the marriage, yet that it would fall under *communio bonorum*, and make the minor liable *jure mariti*, unless the merchant had followed the father's faith in the furnishing. Fountainhall, 11th November 1697, Henderson *contra* Lathreish. — A wife and her husband and her father, being all conveyed by a merchant for an accompt of clothes, taken off by her while unmarried, a minor and *in familia* with her father ; the Lords found as follows, *viz.* 1mo, If she had been *sui juris* & *mater familias*, the time of taking on the accompt, and had wanted a father, that then it would have affected herself, and consequently her husband *jure mariti* ; but being *in familia* with her father, neither she nor her husband could be made liable for the same. 2do, That it behoved the merchant to prove that the things were necessary, and suitable to one of her rank and station, and nowise exorbitant ; in which case, they found there was no need of the father's special warrant for the furnishing the same. 3tio, They found it relevant to affoilzie the father, that he proved the furnishing of his daughter

daughter sufficiently *aliunde*, by paying accompts for her elsewhere to merchants for clothes near the time of contracting this debt. *4to*, They rejected two articles of the accmpt for a watch and borrowed money, as not necessary nor suitable, (tho' she was a Gentlewoman) unless the merchant would prove the watch yet extant, or that they were *in rem minoris versa*. Fountainhall, 14th January 1698, Hopekirk *contra* Daes. --- The father is primarily liable for wedding-clothes furnished to his daughter, upon this *medium*, That he is bound to provide for her, and therefore the furnishing presumed given upon his faith; but the husband is liable *subsidiarie*, because the furnishing was *in rem versum* of his wife, and a debt upon her, and consequently upon her husband by the father's insolvency. June 1730, Fergusson *contra* Muir.

IN an action pursued against an apparent heir, brother to a defunct, by a merchant who furnished mournings to the defunct's family, and to the defender in particular, tho' without any alledged order from him; the Lords found the defender liable, tho' it was pleaded for him, That *qui in funus impendit, videtur contraxisse cum defuncto*; and therefore the defunct's representatives are the persons who ought to be made liable, who in this case was the executor, the defender, apparent heir, no way representing his brother; that the mournings were truly *in rem versum defuncti*, as a part of the funeral expences, as much as mournings furnished to servants; which was alledged to be the custom of all civilized nations, and of our neighbours in England in particular. November 1732, Snodgrafs *contra* Crawford.

FURNISHING to a wife. See Husband and Wife.

REDEMPTION.

THE same order of redemption of comprised lands ought to be observed as in other redemptions used by virtue of conventional reversions, (except concerning the time of the requisition and premonition, which in legal reversions requires only six days) and therefore the Lords found a requisition made against a compriser, by virtue of their own letters, ordaining charges to be directed against the party to come and receive his money, with the charge executed by the messenger conform thereto, not to be a sufficient requisition; and that in orders of redemption of this nature, the requisition ought to be made by a procurator having power from the party to require, and that instruments should be taken thereupon in the hands of a notary before witnesses, as in all redemptions. Durie, 23d July 1622, Earl Desmont *contra* Hay. --- An heritor offering to redeem against the Lord Yester, not only a comprising at his own instance, but also all other comprisings by any other creditor to which he had right; the order of redemption was sustained, tho' thus general, in regard the pursuer was willing to consign all sums for which the defender should show that he had comprisings, and because the pursuer, being a singular successor, could

Order of redemption of legal securities?

could not know all the comprifings, and there was danger of the expiring of the legal reversion. Durie, 12th February 1631, Murray *contra* Lord Yester.

In the instrument of premonition, the party's dwelling-house must be named, place where the money is to be paid, &c.

AN instrument of premonition found null, because it did not mention the special dwelling-place where the party was warned, mentioning only that he was warned at his dwelling-house indefinitely. Durie, 13th December 1626, Earl Buccleugh *contra* Young. — In a clause of reversion, there being no place fixed for the payment of the money, requisition was found null upon this, among other defects, That the instrument did not bear any place at which the reverfer was to repay the money. Durie, 7th February 1628, Maxwell *contra* Ld. Innerwick. Another defect was, That the party was out of the country at the time, to whom the money was to be repaid, and the reverfer was not obliged to pay the same out of the country. Durie, *ibid*.

In order to premonition or requisition, there must be a procuratory in writ.

AN order of redemption was found null for want of a procuratory to the user, who, when demanded, could produce no warrant. Falconer, 23d November 1681, Nasmyth *contra* Nasmyth.

If the procuratory must be produced at using the order?

A PARTY being obliged to pay a sum at any time he should be required, the Lords found the requisition not sufficient, because the procurator shewed not the party his procuratory, tho' the creditor ratified the requisition at the bar; and altho' there was a procuratory lawfully subscribed before making the requisition; and altho' it was not alleged, That the debtor, when required, desired to see the procuratory, but only because the requisition bore not that the requirer offered to show the same, or that he actually did show it. Durie, 13th November 1622, Ld. Bais *contra* Wauchops. — And altho' the instrument of requisition bore, "That the notary read the procuratory to the party;" it was not sustained, since it did not bear that the procuratory was delivered to him as notary in order to be read; for the reading thereof by the notary himself, without the procurator's direction was not an act of his office; and in fines the instrument bears, That the notary read the precept at the desire of the party. Durie, 7th February 1628, Maxwell *contra* Ld. Innerwick. — The order of redemption was sustained, tho' the procuratory was not read nor seen, seeing it was not required. Durie, 7th December 1631, Ld. Cleish *contra* Sanders. — The Lords sustained an order of redemption, altho' the instrument of premonition made no mention that the procurator did show his procuratory, and altho' the instrument of consignation made no mention, either of production of procuratory, or shewing the reversion; but their Lordships declared, That they would not draw this thereafter into a preparative, in respect the pursuer had sustained great trouble in actions for recovery of the said reversion from the same defender. Durie, 21st February 1635, Ld. Earlston, *contra* Ld. Grimmet. — An infestment of annualrent was found loosed, so as to go to executors upon a requisition by the creditor, tho' the procuratory was not produced at the time of the requisition, the same not having been called for, and the defunct having homologated the order, by raising horning upon it. Stair, Newbyth, 19th January 1665, Stewart *contra* Stewart. — A requisition bearing to proceed on a procuratory, and not bearing the procuratory produced, was sustained, the pursuer producing

ducing the procuratory before extract, in respect that the procuratory had not been called for, and also, that the having of the writs, which the requisition mentioned, did import a power to require. Stair 28th June 1671, Home *contra* Lord Justice Clerk. — The like. Stair, 16th June 1671, Lord Lovat *contra* Lord M'Donald. — In a declarator of redemption of a wadset, it being objected, That the instrument of premonition did not bear production of a procuratory, the Lords repelled the objection, in regard it was not alledged, That a sight of the procuratory was demanded. Fountainhall, 29th December 1697, Livingston *contra* Earl Callender. — It being alledged by a donatar of escheat, That a sum was become moveable by requisition; in this unfavourable case the Lords found the requisition null for not bearing the production of a procuratory. Stair, Dirleton, Gosford, 12th January 1677, Creditors of Wamphray *contra* Ld. Calderhall. — An instrument of consignation sustained, tho' it did not bear production of the procuratory, the same not having been required. Home January 1683, Jolly *contra* Paterfon.

A BOND for giving a reversion being only produced in using of the order of redemption, but not the reversion itself, tho' it be produced in the declarator, the order will not be sustained. Haddington, 19th January 1610, Rule *contra* Brown. — The Lords sustained an order of redemption, altho', the time of premonition, the reversion was not shown nor read to the party, seeing it was *in corpore juris*, and so needed not be shown to him. Durie, 26th June 1628, Spotiswood, (*Redemption*) 26th January 1628, Auchinleck, (*Redemption*) 21st February 1635, Ld. Newark *contra* his son. — In a declarator of redemption at the instance of a creditor who had apprised the reversion, it was found sufficient, That an attested double of the reversion was produced, the appriser offering to prove, that the principal reversion was in the defender's hands. Stair, 19th February 1662, Children of Wolmet *contra* Ker. — The like. Stair, 17th February 1663, Montgomery *contra* Heirs of Haliburton.

If the reversion must be produced at premonition?

AN order of redemption used by an assigney to the reversion, was found defective *ab initio*, through the not production of the assignation, the same having been required, but it was found supplied so soon as the assignation was judicially produced and seen by the wadsetter, and the order declared to take effect from that time. Stair, 19th February 1674, Lord Borthwick *contra* Pringle. — An order of redemption made by a singular successor to the reversion, without producing his title at the using of the order, was only sustained to take effect from the time that the title was produced, altho' the papers were at the time in the hands of the wadsetter's lawiers in another process before the Lords. Forbes, Fountainhall, 13th November 1711, Douglas *contra* Carruthers.

Premonition used by an assigney to the reversion, if the assignation must be produced?

IN an order of redemption, the Lords found it sufficient, that the instrument bore the party to have compeared at the place appointed, produced a bag where the sum was, and did offer the same to the wadsetter, altho' it bore not that the money was compted. Durie, Spotiswood, (*Redemption*) 10th March 1630, Grierison *contra* Gordon. Home, January 1683, Jolly *contra* Paterfon.

If the money must be told down?

If a renunciation must be offered to the wadsetter to be subscribed by him?

AT the using of an order of redemption, the wadsetter offering to take his money, but presenting therewith a renunciation, which was refused as not sufficient, it was not found necessary that the reverser should, at the time of the order, have offered a renunciation to be subscribed by the wadsetter, but the lands found notwithstanding redeemed. Durie, 12 July 1634, Lord Balmerino *contra* Lord Jedburgh.

Time of consignation.

CONSIGNATION for redemption found valid, made upon the day appointed, any time after mid-day, tho' before sun-setting, unless the other party can instruct that he came to the place after consignation was made, and before the sun went down. Sinclair, ----
Consignation the day after the term fixed in the heritable bond, found ineffectual, tho' the term fell upon a Sunday; for the Lords thought, that the consignation should rather be the day before than the day after. Fountainhall, 17th December 1702, Ogilvie *contra* Stormonts.

The reverser may retain the money, if the wadsetter appear not.

THE reverser who presents the money, is obliged to do no further, if the wadsetter appear not to demand payment; and if he take up the sum again, he is only liable for the annualrent, but has right to the rent of the wadset lands from the date of the order. Stair, 24th February 1670, Jardin *contra* Johnston. Stair, 8th December 1671, Forest *contra* Brownlie. Gosford, 28th, Stair, 29th November 1672, Duke of Buccleugh *contra* Ld. Thirlstane. Stair, 19th February 1674, Lord Borthwick *contra* Pringle.

Who must be premonished?

AN heritable bond being taken to a man in liferent, and to his son in fee, containing a clause of reversion upon premonition, &c. and empowering not only the fiar but the liferenter to require; an order of redemption and consignation of the money, found null, because premonition was only made to the fiar, requiring him to acquaint the liferenter. Fountainhall, 17th December 1702, Ogilvie *contra* Stormonts.

THERE is no necessity to make premonition to any, but to the heritable possessor, without regard to what hands the land analized under reversion has gone. Spotiswood, (*Redemption*) 9th July 1630, Fisher *contra* Brown. --- In using an order of redemption, there was found no necessity to premonish a compriser of the wadset, tho' he had charged the superior, who, himself, was the reverser, seeing he was neither infest, nor in possession. Durie, 20th March 1629, Earl Buccleugh *contra* Young. --- A tack being set of lands, bearing a reversion upon payment of a certain sum; and which tack the tacksmen assigned to his wife for her liferent use; and the setter having redeemed the tack by paying the sum, and taking translation from the original tacksmen, found, That the tack was thereby evacuated *in totum*, he having paid his money *bona fide*, and not being obliged to know of the wife's translation. Stair, 7th February 1673, Burnet *contra* Fraser. --- A wadset coming by progress into a party's hands, who was infest thereon base, and did inhibit his author upon the warrandice of his disposition; and the reverser, nevertheless, obtaining a renunciation from the cedent, which was duly registred; the Lords, in a pursuit at the assigney's instance, considering, That the reverser paid the money, redeemed his lands, and accepted a renunciation by virtue of obligations, long prior to the inhibition, and so was not concerned therewith, nor

nor any ways *in mala fide*, unless the method of the act of federunt, 19th February 1680, had been followed, by intimating the inhibition to the reverser; they therefore found, That the reverser was not *in mala fide*, neither by the inhibition nor *fasine*, none of which he was obliged to take notice of, tho' a liferenter possessed, which the pursuer contended was his possession; and therefore sustained the renunciation. Fountainhall, 5th January 1698, Watson and Nicolson *contra* Irvine.

A REQUISITION to a minor and his tutors and curators, was found valid, without necessity of obtaining the Lords letters, granting warrant to require tutors and curators. Durie, 6th March 1639, Urquhart *contra* Barclay.

IF the species of money be named in the letters of reversion, the Lords found, That no other species can be consigned without the other party's consent. Sinclair, 15th May 1547, Ogilvie *contra* — In a proper wadset, the rent exceeding the annualrent of the money lent, which superplus, the wadsetter was bound to pay in to the reverser; and the reverser, after many years, obtaining decret for the said superplus, and using order of redemption, and, among other things, consigning the said decret, and a discharge with the superplus of what remained unpaid of the money lent, and then pursuing declarator; the Lords sustained the order, bearing the consignment of the decret *pro tanto*, tho' it was alledged, That the whole money ought to have been consigned conform to the contract; but this the Lords found needless in this case, the decret being accessory to the wadset. Stair, 2d Newbyth, 12th January 1667, Hoge *contra* Hoge. — It being provided in a reversion, that the lands should be redeemable only with the reverser's own money; and yet the money, when offered, was borrowed from another; the Lords found no speciality nor restriction laid on the debtor in this case, but that he might redeem the creditor with any money *cui nihil deerat, cum suum recipit*, unless it had been more clearly contained and provided for. Fountainhall, 16th July 1696, Lord Bargeny *contra* Fergusson of Kilkerran.

PREMONITION being by paction to be made at the parish kirk, the Lords sustained it, tho' not made there, but personally, notwithstanding, that reversions are *stricti juris*. Durie, 11th December 1638, Finlayson *contra* Weemyss. — An order of redemption having been used at Edinburgh, whereas, by the contract of wadset, it was ordained to be at London; the order was sustained, the present wadsetter residing at Edinburgh, and the reverser making up the exchange, and what else the wadsetter suffered by not having his money paid at London. Stair, 1st, Newbyth, 2d February 1667, Creditors of Murray *contra* Murray.

IF the person, in whose hands the redemption money is declared consignable, be absent, or refuse to accept of the same; the Lords found, That the reverser may consign it in the hands of any other responsible man. Balfour, (*Redemption*) 20th January 1551, and 20th April 1559, Adamson *contra* Henryson. — The like. Hope, (*Wadset*) 3d February 1619, Bruce *contra* Buckie.

THO' declarator of redemption may proceed while the money lies consigned, yet, before extract, the money must be exhibited to be given.

ven up to the wadsetter ; and therefore the Lords will ordain letters to be directed at the pursuer's instance, and also at the defender's, if he please, to charge the depositar to exhibite the same. Durie, 7th December 1631, Grierfon *contra* Gordon.

PREMONITION or requisition against parties out of the country. See *Execution*.

IN a declarator of redemption, who must be cited? See *Citation*.

WADSETTER upon redemption, bound only to renounce what right he has from the reverser. See *Mutual Contract*.

R E D U C T I O N.

Who must
satisfy the pro-
duction?

FOUND, That the defender in a reduction must produce the re-
tour called for, being his own evident, tho' registred in the
chancery, which is a publick register. Durie, 12th February 1628,
Ker *contra* Scot. --- In a reduction of an extracted decret of ranking,
the creditors refused to take a day to produce the decret, which being
in publica custodia, and the date condescended on, the pursuer must ex-
tract it himself. Answered, The decret was extracted on the com-
mon expence, and is a common evident ; however the pursuer was
willing to extract the particle of it that concerned his preference, con-
form to § 17. *Regulations* 1695. Replied, The regulations do not
concern the case of satisfying productions, but only where parties ex-
tract for their security, or to obtain payment. Found the pursuer be-
hoved to extract the whole decret, the regulations not concerning this
case. Fountainhall, 23d December 1698, Learmont *contra* Creditors
of Sir Robert Preston. Forbes's MS. 17th December 1713, Auch-
mutie *contra* Hope. --- In a single reduction, the defender, to avoid
certification, giving in a condescendence of the dates of the registration
of the writs called for in the books of session, the pursuer insisted,
That the defender ought to produce the extracts, and that no argument
could be drawn from the case of improbations, which stand upon a dif-
ferent footing ; there, extracts are not sufficient to satisfy the production,
and if the principal writs are to be transmitted, 'tis as easy for the pur-
suer to apply for the warrant as for the defender. Here it is incum-
bent upon the defender, from the nature of the process, to produce
the writs challenged ; and it would be unreasonable to put the pursuer
to the expence of new extracts, when the defender is already possessed
of extracts. The Lords found the defender ought to exhibit the writs
called for on oath, if they be, or were, in his hands since the citation ;
otherwise, that the charge of extracting them lies on the pursuer.
Dalrymple, 24th January 1717, Muir *contra* Miller.

Process of
reduction if it
stops execu-
tion?

FOUND, That a depending reduction of a decret cannot stop exe-
cution thereupon. Balfour, (*Spuilzie*) 9th March 1541, Halyburton
contra Rutherford. Balfour, (*Reduction*) 20th June 1542, Lord O-
gilvie

gilvie contra Campbell. — A party was found liable in a *spuilzie* for proceeding to point upon a decret of the Lords after a reduction of the same was intended, tho' no suspension. Colvil, March 1582, *Vanse contra Ld. Auchtertuile*. — A testament being sought to be confirmed by the commissaries, the Lords refused to advocate the confirmation upon a depending reduction of the testament before their Lordships, but remitted the same to the commissaries; yet four days thereafter in a like case, the Lords advocated the confirmation, and discharged the commissaries to proceed till the reduction was discussed. Durie, 26th July 1626, *Nisbets contra Arthur's relict*.

A GIFT of nonentry being made, and thereafter an heir served and retoured; but the service and retour being reduced at the instance of another, and after all, the Sovereign having made a second gift in favours of a third party, the first gift was preferred, altho' the fee was full betwixt and the making of the second; and this because of the reduction, which rendered the service as if it had never been, and so the old gift was found to revive. Sinclair, 17th February 1548, *Master of Fleming contra Ker*. — An infestment of annualrent granted by a father, after he was denuded, in favours of his son, was yet sustained in competition with other lawful diligence, the creditors having reduced the disposition as fraudulent. Stair, 11th July 1673, *Street contra Lord Torphichen*.

IN a reduction *ex capite inhibitionis* of a disposition to lands, the defender offered to exclude the pursuer, by producing a right to the lands in question prior and preferable to the pursuer's right from the common author, and therefore contending, that the pursuer could have no interest to reduce. Answered, The effect of an inhibition is only declaratory, and the defender's prior rights will not be prejudged, not being called for to be reduced, and it will be competent for the defender to found upon them *in executione*, when possession is sought; yet the Lords admitted the defender to found upon any prior right that might exclude the pursuer. Stair, 11th December 1667, *Hog contra Countess of Home*. — But in a similar case, the Lords, with regard to the general point, were of opinion, That the defence was not relevant; because upon that footing, no reduction could be sustained of any particular right, unless the pursuer were ready to reduce all rights to the subject in the defender's person, which is neither reasonable nor conform to custom; because pursuers may have a particular call to reduce some rights, in respect of the hazard of losing their proof, whether oath of party or witnesses, and yet may not be in readiness to insist against all the defender's rights; nor is the defender prejudged, seeing no possession is sought or other execution, the reduction being only *declaratoria juris*: Yet in the present case, the defender being very poor, and his case favourable, the Lords ordained the pursuer to insist upon what he had to alledge against the defender's other rights produced, as if they had been all contained in the reduction. Stair, 2d January 1666, *contra Wilson*. — And in a reduction *ex capite interdictionis*, the Lords repelled the defence of a preferable exclusive title in the defender, reserving the same *contra executionem*. Stair, 20th February 1666, *Lord Salton contra Lds. Park and Rothemay*. — The like was found, where the reduction was of a fraudulent

Effect of a decret of reduction.

What if the defender offer to exclude the pursuer by a prior and preferable title?

lent disposition *inter conjunctas*. Stair, 29th November 1671, Whitehead *contra* Lidderdale.

WHAT title requisite. See Title to pursue.

PROCESS of reduction, from what time it interrupts bona fide possession. See Bona fide possessor.

REDUCTION of decreets. See Process.

TERMS allowed for production. See Induciæ legales.

R E G A L I A.

Woods.

WOODS were found not to be *inter regalia*, but only forests; and therefore the common clause *cum sylvis, nemoribus, &c.* was found to give sufficient right to such woods, and that they required no special saine. Haddington, 10th January 1610, Ld. of Gargirth *contra* Hunter.

Sea-greens.

It was found, That these sea-greens in carfes, which in spring-tides are intirely overflown, are not *inter regalia*, and therefore need not be established as a separate fee; but that they may belong to the neighbouring heretors, as part and pertinent of their lands. Dalrymple, Bruce, 25th November 1714, Bruce *contra* Ld. Rashiehill and others.

Hidden treasure.

IN a competition about some coin'd money found in a house, betwixt the executors of the defunct who dwelt in that house, and the proprietor, who claimed the half upon the principles of the Roman law, which makes the half of a treasure found in the ground to belong to the proprietor, and the other half to the finder; the Lords were of opinion, That in our practice, treasures and such things which are *nullius, non cedunt occupanti*, but belong to the King, and go to the fisc; but then they considered, that a treasure is *vetus pecuniæ depositio, cujus memoria non extat*; but here the coin was recent, and has been the poor woman's pose who died here, and therefore they preferred her executors. Fountainhall, 29th December 1696, Cleghorn *contra* Baird of Saughtonhall.

By a statute made in parl. 12, Ja. VI. anno 1592, it is enacted,
 " That mines and metals, in so far as they are part of his Majesty's
 " property annexed, or any other way, shall be dissolved, to the ef-
 " fect the same may be set in feu; and that it shall be lawful to his
 " Majesty and his successors to set in feu-farm to every Earl, Lord, Ba-
 " ron, and other freeholder within the realm, all and whatsoever
 " mines of gold, or silver, lead, copper, tin, and other whatsoever
 " metals or minerals, which may be found within their own lands or
 " heretages, for payment to his Majesty of the tenth part of the gold,
 " or other minerals, which shall be found within his lands or here-
 " tages,

"tages, free and without any deduction." Sir Alexander Murray, proprietor of the barony of Ardnamurchan, holding of the Duke of Argyle, who holds the same of the crown, did, upon the above act of parliament, obtain a grant from his Majesty of all the mines within the said lands; the Duke of Argyle conceiving, that the benefit of the act did belong to the King's vassals only, applied for and obtained a second grant from his Majesty of the mines within the said lands. And these two grants being made the foundation of mutual declarators, the Lords found, That the benefit of mines and metals granted by the statute 1592, is not to be restricted to the freeholders who are immediate vassals of the crown, but does extend and belong to all proprietors of land freeholders, tho' holding of subject superiors; and therefore that the grant to Sir Alexander Murray obtained from his late Majesty, of the mines and metals within his own lands, doth carry the right to the mines and metals within the lands of Ardnamurchan, and others holding of the Duke of Argyle. 8th December 1739, Duke of Argyle *contra* Sir Alexander Murray of Stanhope.

SALMON-FISHING if inter Regalia? See *Salmon-fishing*.

REGISTRATION.

Letters of Horning, &c.

HE who relaxes and registers not, cannot alienate, being still holden and repute rebel. Haddington, March 1614, Hog *contra* Paterfon.

Inhibition.

It is appointed by act 119, parl. 1581, That inhibitions with the executions, be within 40 days of the publication recorded in the sheriff-court books, both of the shire where the debtor dwells and where his lands ly, and the principals be signed by the sheriff-clerk, and delivered back to the party, declaring the same to be null, unless duly registred as said is. Upon this ground an inhibition was found null, where the execution at the mercat-cross was not marked and signed by the clerk. Dalrymple, Bruce, 22d February 1715, Sir John Clark *contra* Preston.— But in the like case the objection was repelled, in respect there is no certification of nullity adjected in the act; and therefore, tho' the neglect of the clerk's subscription may subject him to censure, the diligence stands good, being duly recorded, which answers all the ends of the clerk's subscription. 16th June 1727, Dutchess of Argyle *contra* M'Neil of Loffet.

Act 16, Parliament 1617.

A **SASINE** within burgh sustained in a competition, tho' neither registred in the register of the shire nor in the town-books; because there is an exception of such sasines in the act of parliament. Dirleton, 19th, Stair, 21st July 1666, Thomson *contra* M'Kittrick. Stair, 24th, Vol. II. 4 O

What writs
must be regi-
stred by this
act?

30th June 1668, Burnet *contra* Swan. Stair, Dirleton, 24th February 1676, Swan *contra* Burnet. — Upon the same footing the Lords sustained a *fasine* of a tenement in Leith, tho' not a royal burgh, because of the perpetual custom of giving such *fasines* by the bailies of Edinburgh, a royal burgh, unless the competitor would alledge it to be the custom of Leith to register *fasines*. Durie, 10th July 1623, Edmondston *contra* . — The like was found, with regard to reversion of tenements within burgh. Stair, 18th January 1681, Barrie *contra* Halyburton. See act 11, parl. 1681. — An assignation to an order of redemption is none of these deeds that require to be registred by act 1617. Durie, 29th July 1623, Earl Marischal *contra* Keith. — As a formal discharge of a reversion must be registred by act 1617, the same was found necessary, with regard to an obligation, to grant a discharge, tho' not express'd in the act. Durie, 25th November 1626, Turnbull *contra* Scot. — A wadsetter having granted a renunciation of his wadset, which was registred, a private discharge of the said renunciation was found good against the singular successor, who apprised the whole lands from the reverser; because, tho' there is *par ratio* that such discharges should be registred, yet the act 1617 being a correctory law, cannot be extended. Gosford, 20th July 1675, Dunnipace *contra* Olivestob.

To take away apprisings even against singular successors, there needs no formal grant of redemption or renunciation registred, conform to the act, which extends only to wadsets properly so called. Stair, 23d July 1662, Lord Fraser *contra* Philorth. — A backbond by an appriser, renouncing all benefit of his apprising, and discharging the same, in so far as prejudicial to another party's right was found effectual against a singular successor, tho' never registred. Stair, 31st July 1666, Earl Southesk *contra* Marquis of Huntly.

THE author's backbond found good against the singular successor in a tack, tho' neither registred nor intimated to him before his purchase. Stair, 4th January 1668, Forbes *contra* . — The like, with regard to a backbond of trust. Stair, 12th July 1670, Kennedy *contra* Cuninghame.

A CREDITOR having discharged a power he had to uplift and dispose of his sum during his life, this discharge was found effectual against the singular successor, tho' not registred. Stair, 6th January 1681, Bruce *contra* Hepburn.

Registration
a ground of
preference in a
competition,
but want there-
of no, nullity.

REGISTRATION introduced by act 1617, does not thereby become an essential solemnity of the deed, so as the neglect thereof to infer a nullity; the deed is good without registration, only it is declared, "To make no faith in competition with another party, who has a lawful right to the lands, without prejudice to be effectual against the grant-er and his heirs." Thus a *fasine*, not registred, was found good against the party granter of the precept and his heirs. Fountainhall, 23d June 1678, Simpson *contra* Blackie. — And found good against tenants. Durie, 25th March 1623, Ld. Dunnipace *contra* his Tenants. Durie, 13th November 1623, Marishall *contra* Marishall. — And a purchaser, tho' his *fasine* was not registred, was found preferable to the seller's creditor arresting the rents in the tenant's hands: For the *fasine* was a real right with regard to the seller and his creditor, and consequently against the tenants, who did pretend no right to the property. Durie, 24th

24th March 1626, Gray *contra* Tenants. --- In a declarator of liferent escheat at the instance of the superior ; it being objected by the vassal and his creditors, That the vassal's sasine was null for want of registration, and so the liferent could not fall to the superior but to the King ; this was repelled, because a sasine not registred makes a real right, tho' it will not give preference in a competition. Durie, 18th February 1631, Lord Cranston *contra* Scot. --- And, for the same reason, the superior's sasine, tho' not registred, was found a good title in a declarator of non-entry against the vassal, who did pretend no right to the superiority. Stair, 12th June 1673, Faa *contra* Ld. Powrie. --- And such a sasine was sustained as an active title in a reduction and improbation. Fountainhall, 14th November 1678, Dalmahoy *contra* Ainslie. --- An heir infesting himself upon his service, but dying without registering his sasine, and the next apparent heir neglecting the infestment as null, and serving to the predecessor, as if the interjected heir had died in apparen- cy ; the service was found null, and a party deriving right from the interjected heir was preferred to another who derived right from the last heir, but who, not being a purchaser upon the faith of the records, could not plead the privilege of the act 1617. Dalrymple, 17th December 1703, Forbes, 30th June 1705, Keith *contra* Sinclair. --- But, in the like case, an onerous purchaser from the last heir, not knowing of the interjected heir's infestment, having duly recorded his sasine in terms of the act 1617, was preferred to one deriving right from the interjected heir ; because, tho' his author's infestment upon the service was null, seeing the predecessor died not last vest, and seised ; yet with regard to him, an onerous purchaser, the interjected heir's infestment was void and null, and could make no faith in terms of the act. Dalrymple, Forbes, 29th November 1705, Creditors of Paterson *contra* Douglass of Earnshaw. --- In a declarator of thirlage, at the instance of a purchaser of the mill, whose sasine was not registred, the defender excepted upon a liberation, granted him by the former proprietor, which, tho' posterior to the pursuer's right, yet was good against it, null as it was, for want of registration. Answered, This would be relevant were the competition about the property of the mill ; but if the mill belong to the pursuer, it must be his with all its accessories. Replied, The defender was in safety to purchase his immunity from a man whose right to the mill was upon record, and no appearance in the record of any real right denuding him. The Lords sustained the unregistred sasine against this defender, seeing the competition was not about the mill, but the multures. Durie, 21st July 1638, Rowan *contra* Colvil. --- But in a competition betwixt a disponee and an appriser of the same subject, the disponee, whose sasine was registred, was preferred to the appriser who was first infest, but did not register his sasine within the sixty days, appointed by the act. Durie, 4th December 1628, Logan *contra* Hunter.

AN obligation to discharge a reversion, and inhibition executed upon it, was found null in competition with an assigney to the reversion, tho' purchasing after the inhibition, in regard the said obligation was not registred in terms of the act ; and it was found, That the inhibition could have no influence, for if the obligation could make no faith in the competition, it would not support the inhibition deduced upon it. Durie, 25th November 1626, Turnbull *contra* Scot.

Of Adjudications and Apprifings.

FOUND, That an adjudication, whereof the abreviate was not recorded in the terms of the act 31st parl. 1661, tho' led within year and day of the first effectual adjudication, whereof the abreviate was duly recorded, could not be brought in *pari passu* with it. Home, 22d July 1726, Edmondston *contra* Thomson. Which, tho' perhaps, more agreeable to the act of parliament and design of the thing, was yet contrary to the constant current of decisions; by which this interpretation was put upon the act, *sciz.* That the want of allowance is no nullity, that it only takes away the preference due to the apprifing, had it been allowed, but hinders it not to come in *pari passu* upon the act of parliament 1661, *cap.* 62. Compare, Stair 29th November 1672, Maxtoun *contra* Cuninghame, with Stair, 17th July 1668, Stewart *contra* Murrays. Fountainhall, 27th December 1692, Brown *contra* Porterfield. Fountainhall, 12th February 1695, Hay *contra* Birdie. Fountainhall, 17th February 1698, Nicolson *contra* Creditors of Park. Fountainhall, 3d July 1700, Hay *contra* Creditors of Monkton.

Of Tailzies.

A STRICT entail being made of an estate, excluding courtesie, terce, &c. and the sasine which contained the tailzie being recorded, tho' the tailzie itself was not, in terms of the act 22, parl. 1685, it was objected against the relict insisting for her terce, That she was excluded therefrom by her defunct husband's infeftment upon record, effectual against her, whatever it might be against onerous purchasers; the Lords repelled the defence on the tailzie, the same not being recorded in terms of the act 1685. Bruce, 26th July 1715, Anderson *contra* Wishart of Logie.

Booking of Sasines.

A SASINE being registred out of its due place, so that others were booked before it, tho' given in after it; the Lords refused, on a bill, to allow the keeper of the register of sasines to insert that sasine before those that were already booked, but ordained him to raise a summons for that effect, and to call thereto all creditors who had got posterior infeftments, to hear and see his sasine registred of the date it was given in. Fountainhall, 26th November 1678, Lord Cardross *contra* Fowlis. — Whether the registration of a sasine is to be accounted from the signing of the keeper's minute-book, or from the time of inserting it in the publick records. See Bruce's MS. 20th July 1716, Beaumont and Fairholm *contra* Earl Cassils..

Where Writs must be registred.

INHIBITION found null, tho' executed at the head burgh of the regality where the lands lay, and of the shire where the party dwelt,
and

and was registred in that sheriff's court-books, in regard it was not registred in the regality books, as is required by the acts 119, parl. 1581, and 268, parl. 1597. Durie, 20th January 1632, Halyburton *contra* Monteith. — Inhibition must be published at the mercat-cross of the regality, within which the debtor dwells; and it will not supply this defect, that it be published at the head burgh of the shire, and must also be registred in the books belonging to the same jurisdiction, or else in the general register. January 1732, Stirling *contra* Jamieson.

What Writs must go into the general Register?

By act 33, parl. 1685, it is ordained, *That all clerks within the kingdom, who keep such registers as are or have been in use to be delivered to the Clerk-register, to be preserved in his Majesty's general register-house, do give in all the register-books, &c.* Upon this act the Lord-register obtained a warrant from the Lords of session against the directors and clerks of chancery, of which they afterwards obtained suspension, it not having been made out that the records of chancery were in use to be delivered in to the general register. February 1732, Lord-register *contra* Directors and clerks of chancery. — A complaint upon the foresaid act of parliament being given in by the Clerk-register, against Mr. Buchan clerk to the commission of teinds, for neglecting to give in his records; the Lords found Mr. Buchan entitled to keep his own records, in virtue of an express clause contained in his commission, but prejudice to the Clerk-register to order him to preserve them in proper places of safety, as he should see cause. Two things appeared plain, first, That the case did not fall under the statute, in respect the records of the commission had never been in use to be delivered to the Clerk-register. 2^{do}, That supposing the Clerk-register had right to call in these records, it was in his power to grant commissions during life, such as Mr. Buchan's is, tho' to the prejudice of his successors in office. 10th November 1738, Earl Selkirk *contra* Mr. George Buchan.

Registration of a transum'd Sasine where the Principal has been lost.

A PARTY whose sasine was amissing, but the notary still alive, and making it up out of his prothocal, and the party petitioning the Lords to warrant the keeper of the register of sasines to take it in of the old date; the Lords having appointed one of their number to compare the prothocal with the extract now craved to be marked, it appeared to be but a minute wanting the clauses of stile, which the notary had now inserted and ingrossed, and there being other preferable rights on the lands, the Lords, tho' there is one instance marked by the Lord Stair, where such a thing had been granted on a bill, *sciz.* 2d January 1678, Ramsay supplicant; yet doubted if they could allow it any other way *hoc ordine*, but in the precise terms as it stood in the notary's prothocal, and even then *periculo petentis*, and reserving the rights of third parties, (tho' these did not openly appear in this cause) and that the keeper of the register must narrate his warrant, and therefore superseded to give answer, unless they would take it on their peril. Fountainhall, 4th July 1699, Cochran supplicant.

JURISDICTION competent for registration in order to diligence. See *Jurisdiction*.

IF renunciation of an annualrent-right must be registred? See Annualrent (infestment of.)

RELIEF (Casualty of.)

Relief what,
and in what
holdings due?

RELIEF, which is the casualty due to the superior for entering the heir of his vassal in the fee, is the retoured duty only, not a full year's rent. Balfour, (*Relief*) 23d March 1563, Ld. Drumlanrick *contra* Ld. Cockpuile. — Relief is not a full year's rent, but only a favourable rent, *viz.* the retoured duty, and when a superior enters an appriiser, he is intitled to a full year's rent by parl. 1469, C. 36, but he is not intitled both to a full year's rent and to relief. Fountainhall, 25th February 1696, Earl Cassils *contra* Kennedy.

RELIEF is not due to the superior in lands holding feu, and therefore the heir of the defunct feu-vassal was found not obliged to double the feu-duty at his entry in name of relief, unless there had been an express clause in his infestment to that purpose. Hope, (*Vassal*) Haddington, 1st December 1610, Ld. Hatton *contra* Kincaid. 24th November 1736, Earl Dundonald *contra* Bar.

NEITHER is relief due to the superior in an infestment of annualrent; and therefore the superior insisting for two years annualrent, as double the retoured duty, the annualrent right being retoured *quod valet se- ipsum*, the Lords found him entitled to nothing but his ordinary blench-duty. Durie, 12th March 1630, Somervell *contra* Ld. Drum.

When it be-
comes due?

AN heir who takes precepts out of the chancery for infesting himself upon his retour, is *eo ipso* subjected to the casualty of relief, by act 74, parl. 1587, whether he take infestment or not; which may be recovered by a poinding of the ground, or by a personal action against the heir, or the sheriff may be compelled to pay the same, having relief from the heir. Durie, Spotiswood, (*Fiscus*) Auchinleck, (*Sheriff*) 12th March 1628, Ld. Clova *contra* Ld. Lauriston.

RELIEF debitum fundi. See Personal and Real.

RELIEF betwixt principal and cautioner. See Cautioner.

RELIEF betwixt correi debendi. See Debitor and Creditor.

REMOVING.

Who intitled
to pursue a re-
moving?

AN improper wadsetter may remove tenants. Gosford, 16th January 1677, Halyburton *contra* Cuninghame.

A COM-

A COMPRISING without a sasine was not found a sufficient title in a removing, tho' the compriser had charged the superior to infest him, and the superior was out of the country, and the defenders in the removing did not alledge any right to the lands. Durie, Spotiswood, (*Removing*) 25th March 1628, Lockhart *contra* Tenants. — A compriser, tho' having charged the superior, and taken protestation against him for not receiving him, was not found entitled to pursue a removing even against the debtor, until he was infest. Durie, Spotiswood, (*Removing*) 20th February 1629, Galloway *contra* Lord Bogmill.

A PRINCIPAL tenant may remove his subtenant by his own precept. Sinclair, 1st July 1542, Sandilands *contra* Carmichael.

THO' a tacksmen cannot maintain his possession against the superior during the ward, yet he cannot be summarily removed, but must be warned in common form. Sinclair, 28th May 1550, Ld. Dunoon *contra* Stewart. Warning, in what cases a necessary solemnity?

A FORFEITED person, tho' restored *per omnia*, cannot summarily turn out the parties in possession, but must use a warning, &c. in common form. Colvil, January 1584, Chalmers *contra* Cranston.

THE relict of a tacksmen who had a liferent-tack, is not obliged to remove summarily, but must be warned in due time before the term of Whitsunday, tho' when a liferent proprietor dies, his relict or heirs can be removed summarily, and the fiar may then enter into possession of the lands that were in the liferenter's natural possession. Auchinleck, (*Liferenter*) Durie, 13th February 1630, Rowallan *contra* Relict of Boyd. — A liferent-tack being sublet, and, upon the principal tacksmen's death, the master having summarily removed the subtenant at Martinmas, when much of the ground was already laboured, and entred to the possession himself; the Lords, in a process of intrusion and ejection, found the summary removing, without warning, unwarrantable. Fountainhall, Forbes, 11th July 1711, Carmichael *contra* Bertram.

AN appriser may remove his debtor on a summons of six days, without warning, but against other possessors a warning is necessary. Durie, Haddington, Hope, (*Comprising*) 18th January 1623, Earl Lothian *contra* Ker.

THE heretor may charge summarily for the manour place after the liferenter's decease, without any warning. Haddington, 16th June 1612, Home *contra* Home. — In the like case, a removing was sustained without any formal warning. Fountainhall, 14th July 1699, Viscount Frendraught *contra* the Viscountess. — A liferenter, after the decease of a former liferenter, has the same privilege with the fiar of summary removing upon a summons, without formal warning or precept. Durie, 12th January 1622, Lady Kincaid *contra* .

— A summar removing from a manour house on six days, was sustained, without necessity of a formal warning, seeing the house was not necessary for labouring the ground. Durie, 18th December 1630, Ramsay *contra* Ld. Conheath. — The act of parliament anent warnings, relates not to tenants within burgh, and therefore a removing from a dwelling-house and sope-work was sustained, tho' the defender was not warned 40 days before the term of Whitsunday. Stair, 21st

November 1671, Riddel *contra* Zinzan. ---- A house, garden, dovecoat and park in the town of Inverask, being set to a tenant, who had liberty to labour the park, and was to remove from the dovecoat, garden and park at Candlemas, and from the mansion-house at Whitsunday thereafter; in a removing against him, founded upon a warning 40 days before the term of Candlemas, it was objected, That this was a rural tenement, and consequently, in terms of the act 1555, the warning ought to have been 40 days before the term of Whitsunday preceeding the term of removing. It was answered, That this case does not fall under the act of parliament; that the house here was the thing principally set, and the park, garden and dovecoat but accessories. The Lords sustained the objection to the warning, that the same was not used 40 days before Whitsunday. 19th February 1740, Hay *contra* Carse. ---- Found, That a malt-kiln and barn being set for a year, and not for a month or quarter, the tenant could not be removed without a preceeding warning 40 days before the term. Marcus, (*Removing*)

March 1684, Wauch *contra* Abercrombie. ---- The manse follows the church and stipend, so that the intrant minister having right to the one, must have right to the other, and may remove the possessor summarily, without necessity of a formal warning. Fountainhall, 22d December 1692, Coupar *contra* Bruce.

AN heretor may enter to a coal immediately after the liferenter's decease, without any warning, notwithstanding that the coal was set in tack by the liferenter. Hope, (*Removing*) 20th December 1610, Hamilton of Preston *contra* Ramsay of Cockpen.

WARNING is not necessary to found a process for removing a tenant who owes a year's rent, and fails to find caution. Nor is it necessary upon any removing of this kind, which, in its nature, is an extraordinary remedy. Falconer, 22d December 1681. *contra* Bethune of Blebo.

Precept of
warning.

THE Lords found no necessity of a particular precept or order from the magistrate to authorise an officer to warn persons within burgh, by chalking their doors, because, by custom within burgh, parties are summoned without any such warrant, and therefore the heretor's verbal order should here suffice, since the heretor's written order is sufficient in the country, where the warrant must be in writing; besides, that the magistrates of burghs, at the beginning of the year, use to give general orders to their officers to chalk doors when required by landlords. Forbes, 24th, Fountainhall, 25th June 1709, Duncan *contra* Barton.

After what
manner to be
executed?

AN execution of a warning to remove found null, because it did not bear a copy to be left on the ground of the lands, as the act 39, parl. 1555, requires. *Ratio dubitandi*, the tenant was personally warned; and it was pleaded, That the act is alternative, either personally or at their dwelling-place, and at the ground of the lands, which two last make but one member, and are only to be used in case the tenant be not personally warned; but it was answered, The leaving a copy on a forked stick thrust in the ground, as use is, was separately required, and useful, for thereby the subtenants, who need not be warned personally, are acquainted to remove with their masters. Colvil, July 1586, Moodie *contra* Tenants. Fountainhall, 25th February 1680

1680, *Craw contra Craw*. --- The said act requires, That lawful warning be made 40 days before the term of Whitsunday, *either personally, or at their dwelling-places, and at the ground of the lands*. It was objected upon this clause, That a warning was null, because it was not executed against the tenant at the ground of the land; the Lords repelled the objection, because it is sufficient, That the execution against the party bear he was personally apprehended, or that a copy was left at his dwelling-house. And here the execution also bore, That a copy was left on the ground of the lands. Fountainhall, 7th December 1686, *Gordon contra Learmount*. — A warning of removing not being executed against the tacksmen personally, or at his dwelling-house, but only by chalking the door of the shop which was set in tack, was not sustained. Stair, 16th February 1669, *Hamilton contra Harper*.

A WARNING to remove against a man forth of the country, upon 60 days warning at his dwelling-house, ground of the lands, and parish kirk, sustained without proclamation at the mercat-cross and pier of Leith. Haddington, 18th January 1612 Archbishop of St. Andrews *contra Lord Roxburgh*.

THE Lords held a precept of warning as duly executed, tho' the publication thereof at the parish church door was some days before the execution against the tenant, the act leaving it indifferent to begin with either. Forbes, 2d December 1712, *Stirling contra Gordon*. Bruce, 8th February 1715, *Dutchess of Buccleugh contra Davidson*.

AT whatever term the tack run out, the warning must be made 40 days before the preceeding term of Whitsunday. Durie, 8th July 1626, *Fowlis contra*. Durie, Auchinleck, (*Warning*) 16th December 1628, *Inglis contra Tenants*. Durie, 15th June 1631, *Ramsay contra Weir*. — But in cases which fall not under the act of parliament, and where no formal warning is necessary, such as houses within burgh, the heretor may warn at any convenient time before the term of expiry of the tack. Durie, 24th July 1623, *Ker contra Fowlis*.

A WARNING used on the ground, and at the parish kirk on 40 days, against one out of the kingdom, was sustained, he having been also warned at the mercat-cross of Edinburgh, pier and shore of Leith on 60 days. Durie, 11th January 1622, *Ld. Falldownside contra Bannerfide*. Durie, 17th July 1630, *Ld. Ley contra Porteous*. — The Lords sustained a warning, tho' it was used at the party's dwelling-house upon 40 days, while he was out of the kingdom, and no execution at the mercat-cross of Edinburgh, pier and shore of Leith; but here the defender had been but short while out of the country, not *animo remanendi*, and so it was thought he had still a domicile where he was cited, and the Lords, because of the dubiety, superseded removing till the next term without violent profits. Stair, 20th February 1666, *M'Braer contra Chrichton*.

THE Lords decerned in a removing, tho' the warning was given on the 5th of April; and so not 40 free days before the term, without computing the day of execution. Bruce, 8th February 1715, *Dutchess of Buccleugh contra Davidson*.

WARNING of a subtenant without warning the principal, was refused to be sustained, tho' the principal was not in possession. Upon whom must the warning be served? *Spo-tiswood*, Vol. II. 4 Q

tiswood, (*Removing*) Maitland, 22d July 1565, Laing *contra*

— And it was found not to alter the case, That the tack was run out, and the principal tacksmen possessed *per tacitam relocationem* only; for still had he been in the natural possession, he must have been warned, and his granting a sublet, whereby the subtenant did possess in his name, could not alter the case. Durie, Spotiswood, (*Removing*) 2d December 1628, Whiteford *contra* L. Johnston. — But where the subtenant had been in use to pay his rent directly to the heretor, without paying any thing to the principal tacksmen, this was thought to interrupt the tacite relocation, so as to supersede the necessity of warning the principal tacksmen. Durie, 6th March 1632, Lady Lauriston *contra* Tenants. — A principal tacksmen bruiking by tacite relocation need not be warned in a removing, the warning against the subtenant being sufficient. Stair, Gilmour, 30th January 1663, Rickart *contra* Kirkland.

The possessor's infeftment being reduced after warning, must he be warned anew?

A PARTY being warned to remove, who had a title of property in his person, and which title being afterwards taken out of the way by reduction, it was found necessary that he should be warned a second time. Spotiswood, (*Removing*) 21st June 1627, Bad *contra* Ord. — But thereafter, in the like case, the defender was decerned to remove in the same process without a new warning, but not till the term, and without violent profits. — Durie, 7th July 1627, Ld. Pitmedden *contra* Smith.

In what cases does process supersede the necessity of warning?

A SUMMONS of reduction of a tack of fishing, containing this conclusion, "That the defender should be decerned to cede possession," raised and executed 40 days preceeding Whit Sunday, was found sufficient, without necessity of a formal warning, and therefore the defender was decerned to remove from the fishing. February 1732, Robertson *contra* Calder.

If an obligation to remove without warning does supersede the necessity?

NOTWITHSTANDING of the act of parliament anent the solemnities to be used in warnings, yet a tack being so conceived, that it should be leifom to the master at the ish thereof, to enter *brevi manu* to the possession; the Lords sustained the clause, and found that the master his so entring, was neither spuilzie nor wrongous intromission. Colvil, November 1586, Freeland *contra* Monteith. — Such consent interposed in the tack, found a sufficient warrant for the master to apprehend the possession more than a year after the expiration of the tack, he having done no deed, *medio tempore*, to homologate the possession had by the tenants after the tack was at an end. Haddington, 16th February 1610, Ld. Craighall *contra* Kynninmount. — During the currency of a tack, the tenant became bound to pay his arrears at a term certain, with power to the master, in case of failzie, to turn the tenant summarily out of possession. The master was found intitled to eject the tenant *brevi manu*, without necessity of declaring the failzie in a process. Stair, 19th December 1661, Dewar *contra* Countess of Murray. — But where a tack bore, *That if two years duty run together, the tack should expire*; this clause was found not sufficient for a summar apprehending of possession, after the irritancy was incurred, seeing the tack did not bear a power to enter to the possession *brevi manu*. Stair, Gilmour, *ibid*.

ONE being charged simply to deliver a tower or fortalice, the Lords found, That he must deliver the same, with byres, barns, stables, &c. as the pertinents thereof. Balfour, (*Part and Pertinent*) 19th December 1554, Barclay *contra* Barclay. The person who removes must leave vacant possession.

DECREET of removing not fulfilled by the tenant's removal, when, by collusion with him, another steps immediately into possession; but he must deliver or leave the possession void and red. Durie, *penult.* January 1624, Greenlaw *contra* Adamson. Forbes, 21st July 1713, Budge *contra* Sinclair.

A DEFENCE upon seven years possession being proponed in a process of removing, the pursuer alledged, That the defender could not be heard to propone defences, until once he found caution for the violent profits. Answered for the defender, The act 39, parl. 6, Queen Mary, appoints the defender in a removing, to find caution, where he impugns the execution of the warning, without producing any right in his own person: But here the defender produces his infestment, and the possession is *facti*, which must abide probation; the Lords found the defender ought to find caution where the defence is not instantly verify'd, unless the pursuer have something to prove, in which case the defender may take the same term to prove his alledgeance, without being obliged to find caution, seeing the process is not thereby delay'd. Marcus, (*Removing*) June 1687, Sir George Sinclair *contra* Grant. Caution for violent profits.

IN ordinary removings, the defender is bound to find caution for violent profits, but this does not obtain in extraordinary removings, unless so stipulated. Durie, 28th February 1628, Douglas *contra* Iddington.

THE executorial of ejection following upon a decreet of removing, may proceed without a charge upon the decreet to remove, the act 4, parl. 1669, relating only to poindings. Stair, 30th June 1675, Lady Stainhill *contra* Burd. Executorial of ejection may proceed without a charge.

PURSUER *infest* after warning. See *Quod ab initio vitiosum*.

REMOVING may be pursued before the term. See *Term of payment*.

IN what cases may removing proceed upon a summary application without process. See *Summar application*.

WARNING may be followed out after death of master or tenant. See *Death*.

Renunciation to be Heir.

A RENOUNCIATION to be heir was received with this limitation, *Renounces all lands or successions pertaining to his good fire, except these lands which are contained in his father's contract of marriage,* Qualified renunciation.

marriage, and wherein his goodfire is obliged to infest his said father, whereupon inhibition was used; because it was found, That the contract, with the inhibition preceeding the debt, was titulus singularis. Hope, (Heir) 15th June 1615, Heutam contra Baillie. Ult. November 1620, Adamson contra Hamilton. — Found not competent to an heir charged, to renounce with an exception of lands provided to him by his mother's contract of marriage upon which he had served inhibition, but that he behoved either to renounce simply or run his hazard. Durie, 23d January 1627, Lady Ogilvie contra Lord Ogilvie.

Heir may
renounce after
allowing sen-
tence to go a-
gainst him at
the instance of
another.
NOTWITHSTANDING of a decret upon a charge to enter, he is still at liberty to renounce when charged by other creditors. Haddington, March 1604, Ormiston contra Orme. Durie, 10th July 1630, Whitelaw contra Lord Ruthven.

Will be re-
poned to the
benefit of re-
nunciation
rebus integris.
A DECRET being recovered against a party as lawfully charged to enter heir, he in a reduction of the said decret, tho' 16 years after it was pronounced, was allowed still to renounce, the renunciation being offered *rebus integris*; but this only to the effect to take away all personal execution against the reducer, but nowise to stop any real execution against lands, &c. which the said reducer could claim by his predecessor; and the reducer also in this case to pay a sum modified by the Lords for the party's charges, he having debursed the same necessarily by the reducer's fault. Durie, 20th July 1626, Harvie contra Baron. — And this allowed to be done in a suspension without necessity of a reduction. Durie, 13th January 1629, Nisbet contra Nisbet.

HEIR, before he renounce must purge the estate of his proper debts. See Passive title, Behaviour.

R E P A R A T I O N.

Affythment.

A ASSYTHMENT for slaughter was decerned without probation of the estate of either of the parties, and two thirds ordained to be given to the defunct's children, and the third to his relict. Haddington, 18th July 1605, Guild and Birgies contra Home. — Found, That affythment for slaughter must be made to the children as well unlawful as lawful, tho' not equally. Sinclair, 24th June 1542, Children of Forrest contra Ld. Clerkington.

A WOUNDED man giving it under his hand that it was through his own default, and granting also him to be fully affythed and satisfied by the party, he having thereafter died of his wounds, and the party taking remission, and being pursued for affythment by the nearest of kin; the Lords found, That the declaration of the defunct did not assoilzie him, because *hoc ipso* that he had taken and used the remission he acknowledged his guilt, and therefore behoved to affyth the defunct's nearest

nearest kinsmen. Haddington, 25th January 1611, Drew *contra* Horn.

A MAN having inticed a woman and got her with child, and by letters promised to make her happy; the Lords, in a process for damages at her instance, (the man having married another woman) found, That a woman's being got with child is no ground of action for damages, else there would not want abundance of such processes intended by idle women; as also they thought, that every promise and insinuation of marriage was not sufficient to found this action, because these are made at such times very lightly; yet on the other hand such debauchery and fraudulent designs ought not to pass unpunished, and therefore in such a circumstantiated case the Lords declared, That they would allow damages against the man who had *dolose* induced the party to trust him, &c. Fountainhall, 15th July 1696, Hislop *contra* Ker.

Corrupting
a young woman.

A PARTY who, upon a sign'd information as guilty of forgery, had been committed to prison by the King's advocate, and had been liberated upon running his letters, no day being fixed for his trial within 60 days, insisting against the informer for damages and reparation; the informer answered, That he acted *bona fide*, and had good reason to believe the pursuer guilty. Replied, It is more equitable that the damage, which must be born by one of them, should ly upon the rash accuser, than upon the person wrongfully accused; the one was in an error at least, the other in none. The Lords found the informer not liable in damages. 28th December 1727, Mr. Robert Dundas *contra* Arbuthnot and Hope.

False information.

THE Lords sustained action of damages, extending to the principal and annualrents against an instrumentary witness, who, in the reduction of a writ, acknowledged upon oath, that he saw not the party subscribe. Fountainhall, Falconer, 12th February 1684, Allan *contra* Blair.

Witness who
saw not the
party subscribe.

IN a competition about a bond, one of the parties having been preferred in virtue of a forged assignation which he had *bona fide* purchased; and he having conveyed away the subject, and the assignation being afterwards found false, in a process of improbation the Lords found, That the user of the false writ was not liable in damages and expences, but only in so far as he was *lucratus*, by getting more for the claim than he paid for it. Gosford, Dirleton, 26th June, Stair, 14th December 1677, Dick of Grange *contra* Oliphant of Gask.

User of a
forged deed
bona fide.

AN unwarrantable decret being pronounced by the justices of peace, the Lords, nevertheless, assilzied them from the damages, but found the plaintiff liable for the same as an *improbis litigator*. Bruce, 19th February 1715, Ld. Fullerton *contra* Earl Kilmarnock. — Found, That a warrant, granted by a justice of the peace for imprisoning a married wife for a civil debt, was illegal; and therefore, that he was liable in expences and damages. Bruce, 18th February 1715, Pitcairn *contra* Deans and Preston. — An inferior judge having fined and imprisoned an heretor for alledged removing of land-marks, betwixt him and other heretors, of whom the judge himself was one; the Lords

Malversation
in a judge.

found, That, in that case, he could not sit as judge, but should have declined himself ; and that it was sufficient ground to make him liable for the damages and wrongous imprisonment. Fountainhall, 27th July 1711, Leitch *contra* Fairy.

Negligence
in office.

THE Lords sustained a libel, relevant against a messenger to pay a debt for malversing, in so far as he had given a declaration to the privy council, that a party was only incarcerated upon one caption, whereas he was likewise imprisoned by the same messenger on the pursuer's caption, by which concealment the prisoner was set at liberty. Fountainhall, 10th December 1680, Drummond *contra* Dunbar.

AN inhibition being marked as duly registred by the clerk and keeper of a sheriff's register, yet not being booked, and the party inhibited having disposed of the subject in the mean time ; the Lords abstracting from the general points in this case, and without noticing the act of parliament 1686, ordained the clerk and his representatives to be summarily and *incidenter* cited in this process, to answer why he should not be decerned to make up the party's damages and loss, occasioned by his negligence or malversation, in giving a false attest of its being registred when it was not truly done. Fountainhall, 8th January 1696, Scot *contra* Grieve.

AN inferior commissary-clerk having given out a precept of poinding against one of many defenders, tho' there was no decerniture against him, which he alledged was done by mistake ; and the same being suspended, and the suspender dying in the mean time, so that thereby the debt was lost ; the Lords found the clerk liable in the debt, *cum omni causa*. Fountainhall, 9th December 1709, Johnston *contra* Peder.

A WRITER to the signet having received a bond from a party, to raise horning and caption on it, and he delivering it to a messenger for that end, who denounced, before the elapse of the six days, gave it in to be registred, and returned it marked to the writer ; who thereupon writing out a caption, in which, in common form, he says, That the debtor was orderly and legally denounced rebel ; and thereon the said debtor being incarcerated, and, upon summary complaint of the riot, getting the party fined in L. 20 sterling of damages to him ; and then the party pursuing the writer to refund what he had so paid ; the Lords found the writer liable to relieve the client. Forbes, 28th, Fountainhall, 29th November 1710, Wood *contra* Fullerton.

Impeding
of legal dili-
gence.

HE who puts a stop to a poinding, by virtue of a simulate disposition, ought to make the goods forthcoming to the pursuer in the same state they were at the time when the poinding was stopt, or pay the debt due to him in place of damages, the debt being within the value of the goods contained in the inventory, and disposition produced for stopping the poinding. Dalrymple, Forbes's MS. 15th July 1714, Carle *contra* Halyburton. — In the like case it was pleaded for the creditor, That he, who unwarrantably stops a poinding, without any colourable title, ought to be liable for the debt, in name of damages, without regard to the extent of the subject, against which the poinding is directed ; because, as the creditor is deprived of all means of proving, save by the delinquent's oath, which it would be hard to subject him to, there can be no other method for ascertaining his full damages, but

to

to decern for payment of his debt; the Lords, notwithstanding, found the defender only liable *in valorem* of the subject intrometted with. 6th July 1727, Niven *contra* Grieve. — Yet thereafter it was found, That a party, who, upon a simulate disposition *retenta possessione*, did stop a poinding, was liable for the debt; but an offer made by the defender, to make the goods forthcoming *ipsa corpora*, conform to an inventory referred to in the disposition, was found relevant to affoilzie him. 11th July 1733, Blair *contra* Graham.

BOTH the fiar and liferenter are obliged to uphold their house, and therefore are both liable for the damage sustained by its falling upon the neighbouring tenements. Stair, 16th February 1666, Hay *contra* Littlejohn. — An appriser was found liable for the damage done to the adjacent tenement by the fall of a house, tho' he was not the proprietor, having only an apprising of a liferent-right for a small sum. Stair, 14th December 1666, *inter eosdem*. — And that without necessity to prove that the pursuer had required the defender to repair his house. Dirleton, 16th December 1666, *inter eosd.*

If the person, in whose house a fire breaks out, is liable for the consequential damage, debated, but not determined. Marcus, (Summons) February 1685, Doctor Sibbald *contra* Lady Rosyth.

CONTRAVENTION was sustained against a father who had found caution in a lawburrows upon a fact committed by his son who was unforisfamiliar, and who was received into his father's house after the fact was committed. Haddington, February 1597, Earl Errol *contra* Ld. Ludquhairn. — Contravention sustained against a master upon the deeds of his tenants. Haddington, Hope, (Contravention)

July 1611, Vanse *contra* Ld. Balnagown. — Contravention not sustained against a master upon the deed of his servant, unless he be a hired servant for terms to come. Hope, (Contravention) 10th January 1617, Anderson *contra* Galbreath. — Contravention sustained against a master upon a deed of his household servant, tho' the charger could not prove that the servant had any authority from his master. Haddington, 28th March 1623, Ld. Murislaw *contra* Halyburton.

A JUDGE was not found liable for the fault of the officer, who, in the execution of a precept of poinding directed to him in common form, poinded an ox in labouring time. Stair, 28th February 1668, Lord Justice Clerk *contra* Home.

A WOMAN, while her husband was out of the country, having, in his name, unlawfully and violently intrometted with goods belonging to a third party, and disposed of the same at her pleasure, the husband was not found liable to repair this wrong done by her. Durie, Spotiswood, (Husband) 2d February 1628, Scot *contra* Banks. — Yet, in a similar case, while the husband was also out of the country, his lady having employed his servants to demolish a mill, he had been found liable for the same. Spotiswood, (Husband) November 1590, Ld. Ludquhairn *contra* Earl Marischal and his Lady. — A wife, with her husband's consent, having acted herself in the books of the kirk-session, to abstain from the company of a scandalous man under a penalty, and she having thereafter incurred the penalty, the husband was found not liable, it being thought unreasonable that he should be obliged to satisfy

tisfy for an injury done to himself. Haddington, *ult.* May 1610, Bell *contra* Hog. --- A married woman being decerned in a process of scandal to crave pardon and pay a fine, the Lords affoizied her husband from the fine, but ordained her to obtemper the other branch of the sentence. Auchinleck, (*Wife*) 23d January 1634 *contra*. --- Found, That no diligence can proceed against the effects falling under the husband's *jus mariti* upon a decret recovered against the wife before the commissaries for a verbal injury, condemning her in a certain sum, partly to the procurator-fiscal, and partly to the person injured. 5th December 1738, Gordon *contra* Pain. --- A married woman having bleached linen cloth with lime, which is penal by a statute; the Lords, *ex necessitate*, found the husband liable, because the act would otherwise be eluded. Dalrymple, 19th July 1715, Procurator-fiscal *contra* Simpson.

THE Lord M'Donald's horses being arrested in a stable in Burntisland, when the master of the stable was abroad, and a copy of the arrestment left with his wife, and the horses being taken away before he came home by some of M'Donald's servants; the stabler was found liable to make the horses or value forthcoming to the arrester, albeit they were taken away before he came home or knew of the arrestment; unless he could prove they were taken away *vi majori*, or stolen out of the stable without any neglect of his wife or servants, for whose fault or negligence the master of the stable is liable; altho it was not alledged, that the wife consented to taking the horses away. Marcus, (*Arrestment*) 27th January 1682, Brown *contra* Gairns.

IN a pursuit against a tenant for cutting of wood within his possession, upon the act 1698, intituled, *Act for preserving of planting*, the tenant was found liable for his own family. 24th July 1734, Ferguson of Auchinblain *contra* M'Nidder.

DAMAGE arising from the abuse of property. See Property.

COMMAND of a superior, if it excuses from reparation? See Bona & mala fides.

REPRESENTATION.

Limited
and universal
representation.

A MAN may be served heir to the contraveener of the irritancy of a tailzie, without danger of his debt, as in the case of a party interdicted. Gilmour, February 1662, Viscount of Stormont *contra* Creditors of Annandale. --- The Lords found, That the payment of money contained in a bond, was unwarrantable, there being a clause in the bond, discharging the debtor to pay, or the creditor to uplift the sum, without consent of one that was substituted in the bond; and found, That altho' the said substitute was now served heir of tailzie to the granter of the discharge, yet he was not bound to warrant that discharge, tho' he was obliged to warrant any other deed of the defunct. Home, December 1682, Falconer, 10th March 1683, Riddoch *contra* Drummond.

HEIR

HEIR of provision in a bond, liable only *in valorem*. Stair, 3d July 1666, Fleming *contra* Fleming. ---- A substitute in a bond found liable for the institute's debt *in valorem*, after the heir general was discussed. Marcus, (*Bonds*) November 1683, Stark *contra* Bryce.

A PARTY, who was both heir-male and heir of provision to his father, being served *tanquam legitimus & proximior hæres masculus & provisionis virtute contractus matrimonialis*, and having quarrelled a disposition granted by his father after inhibition served on the said contract of marriage, which the other party alledged he was bound to warrant as heir-male, and representing the defunct; the Lords found, That his retour did not singly make him heir of provision, (upon which title he might have quarrelled such deeds) but likewise general heir-male. Fountainhall, 17th December 1708, Sir Robert Home *contra* Sir Patrick Home. ---- An eldest son of a first marriage quarrelling, in a reduction, the provisions made to the children of the second, himself being retoured *legitimus & propinquior hæres* to such a man his father, but alledging that he was only heir of provision in virtue of his mother's contract of marriage, and so might quarrel his father's deeds, the narrative of the retour designing him heir procreated betwixt such a man and such a woman, which he alledged must regulate all the subsequent clauses; yet the Lords found, That as his service and retour stood conceived, he was heir of line simply, and therefore bound to warrant his father's deeds. Fountainhall, 18th July 1710, Ayton *contra* Colvil. Dalrymple, 27th November 1716, Ayton *contra* Lady Ayton and her son. ----- In a contract of marriage an estate being disposed to the husband, and his heirs-male of that marriage, which failing, his heirs-male of any other marriage, which failing, his heirs-female of that marriage; and there being daughters of that marriage, but no sons, a service by the eldest son of the second marriage, as heir-male in general to his father, was found not to carry the provision in the contract of marriage, tho' at the same time he was heir-male of provision; upon which footing the heirs-female of the first marriage, who claimed the estate after his decease, were preferred to his gratuitous assigney. 21st July 1738, Edgar *contra* Maxwell of Barncleugh. ---- It had been formerly found, That a general retour as heir of line, carried right to a provision in a contract of marriage in favours of heirs-male, both characters coinciding in the same person, and that it impowered him to evacuate the provision, by disposing to heirs whatsoever. Forbes, 22d January 1706, Livingston *contra* Menzies.

THE investitures of an estate standing in favours of heirs-male, a special service by the eldest son of the last defunct, as *legitimus & propinquior hæres*, was not considered to be the same with a service as heir of line, but found to be equivalent to a service as heir-male; for *legitimus & propinquior hæres* is a general designation applicable to all heirs, and falls to be limited *secundum subjectam materiam*, that is, in terms of the investiture. Forbes, 13th November 1712, Earl Dalhousie *contra* Lord and Lady Hawley.

AN abbot and convent found obliged to warrant a tack set by their predecessors. Sinclair, 27th July 1543, Sinclair *contra* Convent of Holyrood-
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Representation of churchmen.

Holyroodhouse. — The like of a feu. Colvil, 22d April 1580, Lord Boyd *contra* Abbot of Kilwinning. — Found, That a prelate may oblige himself and his successors in office to warrant lands disposed by him *titulo oneroso*, with consent of the convent or chapter. Hope, (Kirk) *contra*. — Kirklands being set in feu, the Lords found, That the heirs or executors of the setter are not bound in warrandice, altho' the feuar paid money at his entry, because the said money is presumed to have been converted *in utilitatem ecclesiæ*. Maitland, 2d March 1565, Douglas *contra* Feuars.

If an heir can be relieved from the effect of representation where the subject is evicted?

ONE being pursued as infest upon a precept of *clare constat* as heir to his father, the defender alledged *absolutor*, because his father's right was reduced *ex capite lecti* since the serving of him heir, and consequently his service fell therewith. To which it was answered, That the defender being major cannot revoke. The Lords found the defender not liable as heir, in respect the father's right was reduced. It was observed, that if there had been a general service, or a special service, which includes the general, the matter would have been more doubtful against the defender, if any other thing fell under the general service. Marcus, (Airs) March 1683, Farmer *contra* Elder.

Res inter alios.

Proof.

Proof against one party not good against another.

A DECRET recovered by B, wherein he had verified that he was heir to A, no proof of his title in a process against C. Durie, 19th July 1622, *contra*. — The tenor of a bond granted by two parties being proved against one of them, and decret recovered, and now the creditor also raising a process for proving the tenor against the other, wherein he only produced the decret recovered against the first for instructing his *casus amissionis*, and the other adminicles; the Lords refused to suffer him to repete the decret recovered against the former in this process, but found, That he must lead the same witnesses for proving his libel. Newbyth, 1st February 1665, Ld. Broomhall *contra* Marquis of Douglas. — Probation against a party at the instance of a pursuer, is sometimes received against that same party at the instance of another pursuer, as often occurs in the probation of passive titles; but proof against one defender never militates against another, unless he be his representative. Stair, Dirleton, 13th January 1675, Glendinning *contra* Earl Nithsdale. — In a reduction upon the head of death-bed, the pursuer repeting a probation of death-bed led in another process, because the witnesses were now dead, and could not be adduced in this; the Lords found, That the depositions transmitted from the one process to the other could not be used as probative here, because *res inter alios acta & testibus non testimoniis credendum est*. Fountainhall, *contra*.

A TACK of teinds being set with warrandice, and the same being evicted by a decret of spuilzie against the tacksmen's tenants, all holden as confess'd upon the quantities; the Lords found, That the said quantities in the decret far exceeding the just avail, the said decret could

could be no rule for proving the quantities against the setter, but that the tacksmen ought to prove them otherwise in some lawful manner. Durie, 3d March 1629, Murray *contra* Lord Yester.

A PARTY having died *obæratu*s, and it being suggested, that indirect methods were used for concealing his effects, so that application was made to the Lords to grant diligence to try where they were; and one person who was examined acknowledging, that he was debtor to the defunct in two sums, a greater and a lesser, but that the last was comprehended in the first; and thereafter the same party being pursued by an executor creditor of the defunct for both the sums, and founding his defence on the said oath, and its adjected quality; the Lords considering that his said oath was taken in no formal process, but in an extraordinary trial, and that he who was now pursuer had then no title to the debts; therefore they found, That it was not *res jurata* so as to affoilzie the defender. Fountainhall, 13th January 1710, Russel *contra* Baird.

THE Lords found, That a debtor's deposition in a forthcoming to which his creditor was called, did end all process for that debt intended, or to be intended, even by the principal creditor, who not having compared in the forthcoming, will not get his debtor re-examined in a new process. Gilmour, 13th February 1664, Russel *contra* Cunningham. — The pursuer of a forthcoming, wherein his debtor was called *pro interesse*, having referred to the defender's oath what he was owing to the pursuer's debtor, and he having deponed, that oath was found not to hinder the pursuer's debtor to seek payment of what more the deponent truly owed him than was acknowledged by the oath. Forbes, 23d July 1707, Kedzew *contra* Hardie. — The Lords found an oath emitted by the defender in a process of forthcoming not to be *res jurata*, as to the assignies of the arrester's debtor, in respect the oath was not taken *iis deferentibus*, but on the contrary opposed by them, altho' they compared in the process, and competed upon their interests. Forbes, 5th January 1712, Elises *contra* Watson.

THE Lords found, That a decret obtained before the commissaries of Aberdeen against a man, as heir, upon probation by production of his sasine, could not prove him heir before the Lords, unless he produced the defender's sasine and retour. Haddington, July 1622,

Proof led in one process, if relevant to be founded on by a third party in another process?

contra. — A party for verifying another to be heir to his father, producing a decret at a third party's instance against him as heir, which decret also bore production of a sasine in the defender's favours as heir; the Lords found this sufficient, altho' the decret was given for noncompareance. Durie, 25th January, Spottiswood, (Heir) 25th July 1632, Kaidislie *contra* Lauder. ---- A proof led by one creditor of a vitious intromission, may be founded upon by another creditor in a process upon the passive titles against the vitious intrometter. Durie, 10th July 1630, Whitelaw *contra* Ruthven. --- A decret in a process, finding upon probation a man heir to his father *passive*, as having intromitted with the heirship goods, was found no probation of that passive title in a new process at another party's instance, the defender alledging in this new process, that his father was such a person as could not have an heir; which alledgeance was omitted

ted to be proponed in the first. Durie, 26th January 1631, Ld. Gargirth *contra* Ld. Auchinleck.

A TITULAR, in order to prove the value of his teind, having repeted a probation of the value of the land, led some years before at the instance of the heretor's tutor, in order to obtain liberty to sell some parcels thereof for payment of debt; the Lords refused to take in this proof, but left the pursuer to prove the value of his teind as accords. Fountainhall, 3d February 1711, Montgomery *contra* Earl Caffils.

A PARTY, when pursued in a removing, having declared, That he was tenant not to the pursuer, but to a third party, he having been pursued in the same action thereafter at the instance of that same third party, the above judicial confession was found to prejudge him, and to make up the pursuer's title. Colvil, Spotiswood, (*Removing*)

February 1583, Earl Arran *contra* Crawford. ---- A party in a process acknowledging upon oath, that the writ he was using had never been a delivered evident, but lying by the granter at the time of his decease; this oath was found probative against him, in a separate process at a third party's instance. Forbes, 19th January 1711, Sir David Dalrymple *contra* Sir George Home.

Proofed in
one process, if
relevant be-
twixt the same
parties in a-
nother?

A PARTY being first pursued for the violent profits of a house before an inferior judge, and there proponing and proving an exception of delivery of the keys at Lammas, whereby he was assilzied from that action; but being thereafter pursued before the Lords only for the single mail for that term, they found, That the defender needed not *de novo* prove his exception of delivery of the keys in this judgment; but found it sufficiently proved by that decret, notwithstanding the rule, That *deducta coram uno judice non probant coram alio*, specially in an inferior court, and where the case also differed, the pursuits having different conclusions. Durie, Spotiswood, (*Probation*) 16th January 1628, Finlayson *contra* Lookup.

A DECRET holding the defender as confess'd upon the passive titles, which had been referred to his oath, was not sustained as probative of the passive titles in a new process against him at the same pursuer's instance. Durie, 20th November 1629, Lundie *contra* Lundie. — In a pursuit for payment of a sum of money, which the defenders alledged they had paid to one of the pursuers, he before answer being ordained to depone, and notwithstanding of his being held as confess'd, the defenders being decerned for the sum in a repetition at their instance against the said party, his being held as confess'd in the former process, was found a sufficient proof against him. Stair, 9th January 1675, Town of Edinburgh *contra* Earl Lothian.

IN a civil action for reparation and damages, founded upon theft and robbery, for which crimes a sentence of banishment had formerly past against the defender; the Lords allowed the extracts of the depositions taken before the Lords of justiciary to be received *per modum probationis* in this process, but allowed the defender to give in objections against the proof. January 1731, Bontein *contra* Buchannan. — And accordingly it being objected, That one of the witnesses was rendred infamous, since the date of his deposition, the same was sustained to invallidate the deposition; because such depositions being allowed *ex nobile officio*, only to save the trouble of leading the witnesses anew, every objection must be sustained against the depositions that would be relevant

vant against the witnesses were they appearing personally to depone *de novo*. 9th December 1737, Creditors of Machar *contra* Bontein of Mildovan. — In the same process it was afterwards pleaded, That the verdict of the inquest was a *probatio probata*, which could not be overturned by the court of session, that, by the sentence of the court of justiciary, the pannel was convicted of theft, and that damages was a necessary consequence. Answered, That the sentence of the court of justiciary is ultimate so far as it goes; but a sentence inflicting a penalty can be no rule with regard to damages, upon which no judgment was given; and as for the verdict of the jury, it was authorative in the criminal process, but in no other process, nor upon no other judge; the Lords found, That the verdict of the jury is not *probatio probata*, and that it is still competent to the creditors to object to the proof. 27th November 1739, *inter eosdem*. — A process of compt and reckoning which had gone some length before arbiters, probation taken and interlocutors pronounced, having been brought before the court of session, after running out of the submission, without a decreet-arbitral; the Lords found, That the probation, taken before the arbiters, ought to be admitted as evidence, so far as the same is habile, and concluding upon the subject matter of it, reserving all objections upon the import or insufficiency thereof; and reserving to either party to re-examine such of the witnesses as are alive, the party being always at the charge of the re-examination, and the former depositions being previously cancelled; lastly, reserving to either party to adduce what other proof they think necessary. 15th December 1733, Captain Chalmers *contra* Sir James Cuninghame.

A DEFENDER in a forthcoming having deponed, that he was owing nothing to the common debtor, that he had been due a sum by bond, which was now paid, tho' not retired; and the common debtor having thereafter assigned the bond to the said pursuer for security and payment of the debt, upon which the arrestment had been founded; the negative oath, emitted in the forthcoming, was found to meet the arrester pursuing for payment of the same debt, upon this new *medium* of the assignation. Home, 2d February 1722, Fergusson *contra* Maitland.

AN oath emitted before arbiters, found probative of a ground of compensation therein acknowledged, to meet a debt charged for by the deponent's representative, altho' the submission broke up without taking effect. Forbes, 2d January 1708, Wright *contra* Lindsay. — A depending process before the Lords being submitted, and the arbiters having made considerable progress in the compt and reckoning; but the time having expired without any prorogation, so that the cause returned before the Lords; their Lordships found, That minutes, interlocutors and concessions, made in submissions, which did not end in a decreet-arbitral, were binding on neither party; but as to oaths emitted before the arbiters, they thought, That if they had been taken *ex officio judicis arbitri* only, they could not be obtruded as probative in a judicial process; but, in the present case, the oath being taken *parte deferente*, the Lords sustained the pursuer's oath as probative, tho' it did assilzie him from an article charged on him, and so in his own favour. Fountainhall, Forbes, 30th November 1709, Sochan *contra* Boswall.

A JUDICIAL confession, tho' extracted forth of the books of adjournal, was found no sufficient probation before the civil judge, (when the party was pursued *ad civilem effectum*) he having at the emitting thereof, solemnly protested, that his confession should not prejudice him before the said civil judge. Balfour, (*Adjournal*) 14th July 1541, Grierfon *contra* Lord Yester. — *Secus* if he protest not. Balfour, (*Adjournal*) 13th July 1541, *contra* . — Altho' an act of adjournal bear, That the pannel confess'd a spuilzie, and came in the King's will; yet found, That this does not prove the spuilzie against him, when pursued before the Lords *ad civilem effectum*, he always reserving by protestation all defences competent to him before the civil judge. Sinclair, 6th July 1542, Vicar of Kinghorn *contra* Ld. of Seafeld. — But the contrary was found, in a violent intrusion. Sinclair, February 1541, *inter eosdem*, and 16th November 1552, Home *contra* Scot.

Res judicata

Decree against one party, how far effectual against others.

THE proprietor's infestment being reduced, the subaltern infestments granted to the possessors will not defend them in a removing, tho' they were not called to the reduction. Haddington, 2d February 1610, *contra* . Haddington, 4th June 1611, *contra* . Haddington, 23d July 1612, *contra* . Durie, 17th February 1631, Ld. Cluny *contra* Ld. Heart-hill. — In the like case of a reduction and improbation of the vassal's rights, at the instance of the superior; the Lords found, That the subvassal needed not be called in the improbation, and that his right fell in consequence of a certification against the vassal; but they also found, That the subvassal, producing his author the vassal's infestment in the second instance by a reduction, ought to be reponed against the certification. Stair, Gosford, 27th January 1676, Bishop of Caithness *contra* Innes. — In like manner a singular successor, tho' not infest, was allowed to produce his author's infestment, against which certification had been extracted, and to be reponed against the same, he, the singular successor, not having been called in the reduction and improbation. Stair, 8th June 1670, Doctor Hay *contra* Jamieson. — Certification against the reverser, found not to militate against a proper wadsetter, publickly infest. Stair, 15th July 1670, Major Biggar *contra* Cunningham.

A FORFEITURE being reduced *per modum justiciæ*, all dispositions granted by the donatar of parts of the land, were found to fall in consequence. Sinclair, 20th March 1543, Campbell *contra* Ld. Grange. — John Stewart being dishabilitated by the parliament, without citation or crime, but in consequence of his father the Earl of Bothwell's forfeiture, the Earl of Home thereupon got a gift of the abbacy of Coldingham, belonging to John Stewart; the said John Stewart being afterwards rehabilitated, not by way of grace, but of justice, as not accessory to his father's crimes, the Earl of Home's right was found to fall in consequence, tho' the rehabilitation past without citation or hearing of parties. Stair, 24th February 1665, Douglass *contra* Ld. Wedderburn.

IN a

IN a spuilzie of teinds, the Lords found, That there being years to run, both of the principal tack, and of a sub tack, these to run of the sub tack could not defend the sub tacksmen in this process of spuilzie, where the principal tack was reduced before, altho' the defender was not called to the reduction, and yet was in actual possession of the teinds. Durie, 11th December 1623, Earl Wigton *contra* parishners of Stobo. — But a principal tack being reduced, the sub tack was not found to fall in consequence, being consented to by the pursuer, who ought therefore to have called the sub tacksmen in the reduction of the principal tack. Durie, 13th December 1626, Earl Galloway *contra* M'Culloch.

A DECRET being reduced, the horning falls of consequence, tho' the officers of state be not called, who have interest upon accompt of escheat. Durie, 1st December 1629, Vanse *contra* Butter.

A DECRET of liquidation against the principal, proceeding upon proof by witnesses, found good against the cautioner, unless he could instruct collusion. Stair, 24th June 1665, Irvine *contra* Strachan. — A debtor having raised reduction of his bond upon minority and lesion, tho' he was held confessed *de calumnia*, this was found not to bar the cautioner from insisting in the reduction, and proving the minority and lesion. Durie, 22d January 1629, Fairbairn *contra* Kello. — A cautioner for an executor was not admitted to propone exhausting, the executor himself having proponed it, and succumbed therein. Durie, Haddington, 4th March 1623, Wood *contra* Executors of Ker. — A principal succumbing in a defence of payment, the cautioner being pursued for the debt, was admitted to a proof of the same defence over again, because intimation was not made to him in the pursuit against the principal; and it is not reasonable that the negligence or collusion of a principal should prejudice the cautioner. Stair, 11th December 1673, Earl Kinghorn *contra* Earl Winton. — Where exhausting was omitted by the executor, it was admitted for the cautioner, being instantly verif'd. Durie, 9th July 1623, Arnot *contra* Home of Manderston. — The Lords found, That seeing a party was only cautioner for another in a suspension, it was competent to him to propone any defences, tho' omitted by the principal party; neither would they confine him to prove them instantly, but allowed him terms for that effect. Fountainhall, 12th March 1685, Dick *contra* Cragie. — A decret being taken out by the tacksmen of the customs against his cashier, for a balance in his hands, without calling the cashier's cautioner, the Lords, in a suspension, allowed the cautioner to be heard against the accompts, as if he were yet *in libello*, and found the decret not to be *res judicata*, either as to relevancy or probation. Forbes, 28th December 1709, Hamilton *contra* Calder.

MORISON takes a security for a victual-annualrent at liquidate prices, exceeding legal interest, which being suspended on that, with other reasons, the Lords repelled them all; yet he being afterwards sued by the advocate for usury, the defence of the former, *res judicata*, that he had a decret for his warrant, was repelled. Durie, 8th March 1623, King's Advocate *contra* Morison. — A party being pursued as lucrative successor, and affoizied upon his proving, That the disposition was for an equivalent onerous cause; this was found not to prejudice

*Exceptio rei
judicatae non re-
levant against
third parties.*

another creditor pursuing him upon the same ground. Stair, 6th January 1665, *contra* Edmonston.

EXCEPTIO rei judicatæ, *if good against the same pursuer in a new process? See Process, § Competent and Omitted.*

ACTIO & exceptio rei judicatæ *upon foreign decrees. See Foreign.*

AN apparent heir being decerned passive upon proponing peremptors, *if such a decret can be founded upon by other creditors? See Passive Title, § Behaviour.*

R E T O U R.

Form of re-
tours.

A RETOUR made in form of a decret in court, signed by the clerk, and containing the names of the inquest, with their declaration, was found sufficient within burgh, altho' it was not under the seals of the inquest, closed under the bailie's seal, conform to the rules of chancery. Maitland, 10th December 1554, *contra*.

Summons of
error.

THO' a retour be reduced as proceeding upon mistake, yet the jurors on the inquest who sign the retour, may be acquitted, as having been under probable cause of error. Durie, 22d March 1633, the King *contra* Earl Strathern. --- The inquest was affoizied who had served the second brother heir to his father, tho' the eldest was alive, because the said eldest had been seven years out of the country, and habite and repute dead by his father and the neighbourhood. Maitland, 21st November 1561, Wood *contra* an Inquest.

RETOURS *if reducible via ordinaria, or if there must be a precept out of the chancery? See Competent.*

IN what cases quarrelable by exception without reduction? *See Competent.*

R I G H T I N S E C U R I T Y.

A right in
security is an
exclusive right
to the subject,
but not to the
rents or an-
nualrents.

A DEBITOR, after his lands were apprised, having uplifted his farms from his tenants, sold the same, and assigned the bond for the price; the appriser was found to have no right to that bond, because an apprising hinders not the debtor to uplift his rents, for as the appriser has it in his option to intromet or not, if he forbear, the debtor must have liberty. Stair, Gosford, 29th July 1675, Earl Panmure *contra* Collison. — Altho' an appriser be publickly infest, yet tenants

tenants are still in *bona fide* to pay to their old master, except diligence be done after the infeftment. Spotiswood, (*Comprising*) 11th July 1634, Earl Lothian *contra* Vassals of Jedburgh. — A wife possessing a tenement of her husband's for her aliment, himself being out of the country, was found *bona fide* possessor, and not obliged to repete the fruits to an appriser. Stair, 7th December 1665, Smith *contra* Robertson. — Tho' apprisings led within year and day come in all *pari passu*, yet the appriser who enters into possession has the sole benefit of his own intromissions, because an appriser may chuse to possess and intromet or not as he pleases, and if he insist not for possession he has no claim. Stair, 17th July 1675, Boyd *contra* Justice. — The like. Fountainhall, 4th January 1695, Wallace of Ingliston *contra* Sir George Campbell of Cefnock. — In a competition among apprisers it being objected against one, That it was null, because the ground of it, being partly a bond and partly a decret proceeding on an accompt, which decret was turned into a libel, and the debt referred to the defender's oath, who had never yet deponed, and so the comprising being led for sums partly not due, it was null *in totum*; yet the Lords found, That the comprising was not liable to refund the mails and duties intrometted with by him before intending of this process, tho' the said decret was turned into a libel; but here the other competitors had done little diligence, and if this appriser had not intrometted, the common debtor would have done it. Fountainhall, 22d November 1677, Boyd *contra* Malloch.

In a question touching the property of some stones dug out of a quarry, betwixt the donatary to the heretor's liferent escheat, and a party who stood infest in the lands where the quarry lay upon a disposition for relief of cautionry; the Lords found, That the property of these stones now removed off the ground by the donatar, and not being pointed by the infester, (which he might lawfully have done) belonged to the donatar, and not to him who had the real right. Fountainhall, 15th February 1707, Lady Mary Bruce and Cochran of Ochiltree her husband *contra* Colonel John Areskine.

FOUND, That a Lady's intromissions with the rents of her deceased husband's lands, for aliment and education of the apparent heir, were *bona fide*, till she was interrupted by a citation in an action for mails and duties against the tenants at the instance of an adjudger. Bruce, 19th July 1715, Miln *contra* Lady Galraw.

Unless diligence be done for uplifting the rents.

MONEY being consigned in the order of redemption of a wadset, it was nevertheless found not moveable, and therefore not the subject of an arrestment, except either decret of redemption had followed upon the order, or else the wadsetter renounced, and granted the lands lawfully redeemed; and this because either the configner might pass from the order, or the order might not be sustained by the Lords. Durie, 21st June 1626, Murray *contra* Dishington and Scot. — A Lady kenned to her terce of lands wherein her husband was infest redeemably, and the sums for which the lands were redeemable having been charged for by her defunct husband; yet because no redemption nor renunciation followed thereupon, so that the defunct died undenuded, the Lords sustained her action against intrometters. Durie, 16th February 1642, Veitch *contra* Tenants. — But in this case, the heir's

Real security after what manner loosed?

tutors having renounced the wadset, and completed the order begun by the defunct, the Lords sustained that renunciation relevant to elide the pursuit, and elide the terce, (the sum being now moveable) because the renunciation depended upon a necessary preceeding ground of reversion, altho' there was no declarator of redemption. *Durie, eodem die inter eosdem.* — The granter of a wadset having, upon the wadsetter's requisition and charge for payment of the money, offered to consign it by way of instrument, the Lords refused to allow the wadsetter afterwards to pass from his requisition and charge, and recur to his right of wadset, altho' the reverser had used no order of redemption by premonition and declarator against him. *Forbes, 25th July 1710, Ross contra Ross.* — But thereafter in the same cause, the Lords allowed the wadsetter, after using requisition and charging for payment of his money, to pass from the charge, and recur to his right of wadset, by insisting in a process of removing against the granter, altho' he the granter consigned the money in the clerk's hands, but not till after the requisition was past from, and after the removing was judicially called, without prejudice to the reverser to use an order of redemption as accords. *Forbes, 14th November 1710, Ross contra Ross.* — In the case of an heretable bond, containing a provision for infesting in certain lands, and a reversion upon premonition by the debtor, it was found, That consignment of the sum by the debtor, altho' orderly done upon premonition, was yet ambulatory, and that it was in his power to uplift the sum before declarator, or before the creditor had acknowledged the consignment; till which the sums were not in the property of the creditor, and consequently not arrestable for his debt, or confirmable by his executor. *Stair, Gosford, 21st January 1673, Nicol contra Laurie. 8th February 1681, Dunbar contra M'Kenzie.*

A REAL creditor upon a bankrupt estate, having agreed with the debtor to accept of a certain sum in place of his whole claims, and the debtor having consigned the sum upon the creditor's refusal to implement the bargain, and thereupon having obtained interlocutor in his favours, declaring the creditor's claims upon the estate to be sopite and extinguished; there ensued a competition upon the consigned sum among several parties to whom the said creditor was due sums of money, and who had arrested, some before and others after the said interlocutor: It was objected against the prior creditors, That the money belonged to the consigner before the interlocutor; the Lords, notwithstanding, preferred the prior arresters, being of opinion, That the superveneing interlocutor was but declaratory. *19th January 1739, Arbuthnot contra Lockwood and Gibbon.*

Not loosed
by diligence.

FOUND, That an infestment of wadset was extinguished, and that the party had tacitly passed from the same, he having after the date thereof comprised the reversion of the same lands for the same sum; by which comprising standing unrenounced, the Lords found, That he had prejudged himself as to the preceeding wadset. *Durie, ult. January 1623, Lady Dowhill contra Lindsay of Dowhill.* — The contrary found. *Dirleton, 15th January 1668, Trotter contra Trotter.* — Tho' an apprising was deduced, not upon the real right of infestment of annualrent, but upon the personal obligation for the principal and bygone annualrents upon requisition, which was a virtual passing

from the infestment of annualrent; yet this was not found to be a real extinction of the infestment, and the appriser was allowed *pro loco & tempore* to pass from his apprising, and be preferred for his bygone annualrents in virtue of his infestment of annualrent. Durie, 29th January 1635, Hamilton *contra* Wilson. Stair, 24th January 1663, Graham *contra* Ross. Gilmour observes it, July 1663. ---- The like. Stair, 22d December 1671, Campbell *contra* . ---- And in a competition betwixt two infesters of annualrent, one of whom had comprised for his principal sum, the Lords were clear, that notwithstanding the comprising he might have recourse to his former right. Dirleton, 15th June 1667, Kay *contra* Fleming.

AN adjudger upon a bankrupt estate, having obtained payment of part of his accumulate sum out of the debtor's other effects, in a competition betwixt him and the other adjudgers, who were *pari passu* with him upon the price of a remaining part of the estate, the question occurred, whether he was entitled to draw in proportion to his accumulate sum till he was fully paid up, or only in proportion to the sum that remained due; it was contended for him, That his real security was not diminished, tho' the sum secured was; that his security remained the same till the last shilling was paid, and that it was his real security which entitled him to draw not the sum that was secured. The Lords accordingly found, That the adjudger, who had recovered the partial payment out of the debtor's separate funds, ought to be ranked for the whole sum in his adjudication *pari passu* with the other adjudgers, in order to recover payment of what remained due after the said partial payment. 16th February 1734, Earls of Loudon and Glasgow *contra* Lord Ross.

Real security remains in force till the last shilling be paid.

A PARTY, who was debtor in a considerable sum of bygone jointures, assigned to the creditor, for her security and payment, the first and readiest of a sum due to him, bearing annualrent; after the life-rentrix's decease, her executors insisted against the debtor of the bond assigned for payment for a proportion of the bond effeiring to the bygone jointures, and also for annualrent; the creditor of the bond appeared for his interest, and opposed the demand for annualrent, alledging, that the bygone jointures bore none; the Lords found annualrent due, as being accessory to the principal sum assigned, in security and payment of the bygone jointures. Fountainhall, 25th January 1699, Inglis *contra* M'Moran.

If a creditor, in virtue of his security, can draw more than the sum secured?

R U N - R I D G E.

A JUDGE having made a division of run-ridge, conform to the act 23d, parl. 1695, whereby he had taken away the dwelling-house, offices-houses, &c. of one of the party's, and allowed him other lands, whereon there were no houses, tho' the act requires judges to have regard to mansion-houses in the partition; but on the other hand the houses being but mean and inconsiderable, and the other party

offering to build him as good houses ; the Lords, because the act defines not how many rooms the mansion-house should consist of, and that men have regard to the place of their own birth, which could not be restricted to towers, large houses, &c. reduced the division as iniquous ; and if the parties insisted, appointed a new visitation to be made. Fountainhall, 7th December 1698, Taylor *contra* Earl Callendar.

S A L E.

Price conferred in arbitrium.

THE price being by the feller referred to the buyer's own appointment, and he determining, the Lords found the sale good, and not disagreeable to the law and practice of this kingdom, tho' directly opposite to the common law. Durie, 13th March 1639, Earl Montrose *contra* Scot.

Price not stipulated.

THE Lords found parties who bought a bargain of victual, without an express price agreed on, liable for the ordinary prices that such victual gave in that place of the country at the time of the bargain, without regard to the fiars. Forbes's MS. 1st, 27th January 1714, Leslie *contra* Millers.

Rental.

SEVERAL friends of a bankrupt family agreed among themselves to transact the debts, and to take off parcels of the estate for payment ; in a compt and reckoning betwixt the heir, who acceded *ex post facto* to this treaty, and one of the friends who had agreed to take one barony at sixteen years purchase ; a dispute arose about the rental in order to fix the charge : The Lords found, That the kain ought to be stated in the rental, in case that at the time of making the bargain, a price was exigible for the same when not paid in kind ; and also, that the services ought to be stated, if, at the same period, a certain value was exigible when not performed. 13th February 1735, Captain Chalmers *contra* Sir James Cuninghame.

Actio redhibitoria & quanti minoris.

A PARTY excepting against a bond granted by himself, that it was for the price of goods which were found vitiated and rotten, they being sold by a Dutchman to him, to whom he also granted the bond ; the Lords found, That the defender ought to condescend upon the vitiosity of the goods, and the way of proving and trying the same in Holland, tho' the pursuer alledged, that the defender should have come back and offered him all the goods in due time, whereas he had now sold them all off, and was pretending to an action *quanti minoris* before the dean of gild. Newbyth, 6th January 1665, Hoggerworth *contra* Hamilton. — An exception being made against payment of the price of lintseed, that it was insufficient and did not grow ; this reason was not found relevant, unless it had been qualified, that the rest of the parcel, which was sold by retail to other people, was of the same nature, and that none of it did grow, because the failure of one parcel might have happened otherwise than from insufficiency of the seed. Gosford, 1st July 1668, Alston *contra* Orr. — A buyer being charged

ged for the price, it was not found competent to him to prove by witnesses, that the goods were insufficients since he had sold the same, and never offered them back to the charger, nor intimated to him, that there was any loss upon the cargo for the space of two years, until he was charged for the price; but the Lords found the insufficiency relevant to be proved by the charger's oath. Stair, Gosford, 7th July 1675, Paton *contra* Lockheart. — Found, That the seller was not bound to take back the victual, tho' insufficient, a year having elapsed before the offer, so that the victual might be deteriorated, meerly by so long keeping. Fountainhall, 28th November 1684, Brisbane *contra* Merchants in Glasgow. — One who had bought a cargo of wheat, being charged on the contract for payment of the price, which, by a posterior writ, he had acknowledged to be L. 1700 Scots, having suspended upon this reason, That the wheat was blacked and spoiled, and therefore craving a deduction; the Lords sustained the reasons of suspension, and admitted the same to proof, and found, That *id agatur tantum* in the posterior writ to ascertain the price, not to pass from any objection upon the insufficiency of the wheat. Fountainhall, 2d December 1686, Sir John Baird of Newbyth *contra* Charteris. — In a pursuit for the price, the Lords repelled the defence, That the goods were insufficient, in respect the defender did not show them to a magistrate at the first discovery of their insufficiency, or take witnesses on it by way of instrument. Fountainhall, 21st February 1694, Mitchel *contra* Bisset. — In a suspension of a charge upon a ticket on this ground, that it was granted for the price of some silk commissioned from London, and offered to be proved by witnesses, that it was neither of the colour that was commissioned, nor yet full weight; the Lords refused to divide the probation, since the suspender had both granted bond and intromitted with the silk, but found it only probable by the oath of the London merchant, and this because of the trust among merchants, altho' the bond was granted before receipt of the silk, Fountainhall, 7th February 1678, Shewan *contra* Moubray. — In a pursuit for the price of a horse, an exception was made, That the horse was crooked when he was bought, and the defender offered him back in as good condition as he got him; the Lords respected not this offer of restitution, made *pendente lite*, and the defender had kept the horse a year without making any such offer. Durie, 9th January 1629, Brown *contra* Nicolson. — In repetition of the price of a horse, which was 12 years old, tho' the seller upheld him at six; the Lords refused to sustain process, unless he would condescend that, very shortly after the purchase, he had offered back the horse. Stair, 29th January 1668, Ld. Aitoun *contra* Fairy. — A horse being sold that was found to be infected with the *mord de chien*, the Lords sustained the *actio redhibitoria*, the pursuer proving that the horse was infected at the time of the bargain, and that he was offered back within 24 hours after the pursuer discovered it. Fountainhall, 16th February 1681, Welwood *contra* Gray.

A HORSE being bought in a publick mercat, and thereafter found to have the spavie and ringbane, and so offered back, but it not being proved, That the seller upheld him as a sound wholesome horse; the Lords, on this last account, assilzied from the repetition of the price. Fountainhall, 23d January 1712, Morison *contra* Forrester. —

Qui scienter emit rem vitiosam, has no recourse against the seller. Had-
dington, December 1594, Shaw *contra* Ld. Sornbeg.

*Lesio ultra
duplum.*

A PARTY who had given a bond of a 1000 merks, as the difference of the value in exchanging a horse for a mare, challenged the same upon enorm lesion, and offered it to the creditor's oath, whether, in his own esteem of the rate, the debtor, granter of the bond, was not lesed above the double. It was answered, *imo*, Our custom follows not that ground of the civil law of annulling bargains, made without cheat or fraud upon inequality of the price. *2do*, By a ticket a-part of the same date with the bond, the granter declared upon his soul and conscience he should never impugn the same; the Lords, in respect of the ticket, and that there was no fraud or deceit qualified, affoizied the defender. Stair, 23d June 1669, Fairy *contra* Inglis.

Sale by a
sample.

VICTUAL being sold conform to samples, not sealed at the making of the bargain, and the buyer having then declined to seal them; the Lords found, That the samples were not the rule of the bargain, and that the buyer relied on the faith of the seller. Forbes, 29th January 1713, Cheap *contra* Cleugh.

Weight,
measure, &c.

WHEN liquor is sold in bottles, the bottles must be of a certain fixed measure known in law, and the seller is not at liberty to make use of bottles of an uncertain measure, 24th June 1735, Procurator-fiscal of the dean of guild court of Edinburgh *contra* Colonel M'Dowal of Castlesemple.

Sufficient
progreß.

A PURCHASER suspending, because he had not got a sufficient progreß of the lands; the Lords found, That the buyer was not obliged to accept of a lame progreß, tho' there was prescription and 40 years possession, because that doth not amount to a right, and there may be replies upon interruption, and at the best prescription is not a right, but *exceptio temporis*. Dirleton, 13th June 1676, Nairne *contra* Scrimzeour. — In the same cause, the Lords allowed to the charger a time for making out a better progreß; but found, That the suspender could not be forced to acquiesce in absolute warrandice, it being only the ground of a personal action, and may become ineffectual, if the warrantor become insolvent. Dirleton, *ibid*. — The purchaser cannot retain any part of the price upon alledged defects in the progreß, in respect that the lands were disposed with warrandice, and a 40 years progreß was delivered, which the Lords thought sufficient, where no incumbrances did appear. Home, March 1682, Paton *contra* Gordon. — A purchaser at a publick roup, seeking a defalcation upon account of the teinds purchased by him along with the stock, to which he alledged the bankrupt had no good right. It was answered, That he purchasing, with his eyes open, knowing the nature of the rights to the subject, and having also the creditors bound in absolute warrandice for the sums they receive, there ought to be no defalcation: The Lords found the pursuer is not entitled to a deduction of the price, but that, if he would, he might give up the bargain. It was taken notice of, That the case was not of a total want of right: Here was a right *ex facie* good, the purchaser only starting objections, which were never sustained

sustained to infer a defalcation of the price. 14th November 1738, Earl Morton *contra* Creditors of Cuningham of Boquhan.

A CHARGE for the price of lands was suspended upon this *medium*, Obligation to relieve from, and purge incum-berances. That, by the disposition, the charger is obliged to relieve the suspender of all inhibitions, several of which were condescended upon; the charger answered, *Non relevat*, unless there were a distress, seeing the disposition bears not to purge, but only to relieve; the Lords considering, that the charger *vergebat ad inopiam*, found the reasons relevant till caution were found to warrant the suspender from these inhibitions. Stair, 4th February 1662, Ld. of Elphinston *contra* Murray. — A man having bought lands, and retained a part of the price, because of two inhibitions affecting the same, but giving bond (as was concerted) to a creditor of the seller's, bearing, that the retained sum was a part of the price, but that he was to have retention of it for five years, that these inhibitions might be purged in the mean time; and he being charged on his bond, after the elapse of these years; the Lords, in a suspension of this charge, found, That, tho' the bond bore the money to be a part of the price, and mentioned the incumbrances; yet that the limitation of the time was an implicate renunciation of the purchaser's privilege of retention; and so repelled his reason of suspension. Fountainhall, 2d July 1706, Smith *contra* Somervell. — A purchaser having been allowed to detain part of the price till an infestment were purged, was now, after the running of the long prescription, found liable to pay up the balance, upon his getting discharge with absolute warrandice and caution to be relieved of that infestment, and the cautionry to subsist for ten years (in case there should be no distress within that time) from the date of payment. Bruce, 22d February 1715, Marjoribanks *contra* Ld. Dirleton.

A BUYER of land being allowed to retain part of the price till an incumbrance should be purged; and that having become imprestible, What if purging incumbrances become imprestible? and the seller seeking annualrent for the retained money, because the buyer was also in possession of the lands, and offering likewise caution to warrant him against the said incumbrance; the Lords found, in so far as the yearly profits of the land did exceed the annualrent of the sums paid, that the defender should pay back the same to the pursuer; but, as to the rest of the profits, refused to sustain action, because the said renunciation was not obtained. Durie, 20th July 1626, Ld. Clunie and Stirling *contra* Ogilvie.

LÆSIO ultra duplum in other contracts. See Læfio ultra duplum.

SALE of moveables by one who has not right. See Moveables.

SALMON-FISHING.

SALMON-FISHINGS were found to be *inter regalia* within Right of salmon-fishing, by what form of words established. sea-mark, or where the sea ebbs and flows, or where salt water comes, or where the fishing is with a coble or trail net; in all which cases it was found

found to require expreis disposition, otherwise, that it passés under the clause *cum piscationibus*. Erskine, 29th June 1593, Leslie *contra* Aytton. Haddington, 30th July 1605, Ld. Garlies *contra* Ld. Torhouse. Haddington, March 1606, Ld. Garlies *contra* M'Culloch.—An infestment of lands from the King, *cum piscationibus in aqua de Nith*, with continual use of fishing salmon in the said water, and debarring others therefrom, was found sufficient to defend against a removing at the instance of one who was infest in the said salmon-fishing *per expreisum*. Durie, 26th March 1628, Maxwell *contra* Portrack.

THE Lords sustained a party's right to a salmon-fishing, tho' his charter bore only *cum piscariis*, and not *salmonum piscationibus*, and this because of old the word *piscaria* carried all sorts of fishings; and, in the present case, the saines of the parties made it clearer, wherein the symbols for tradition bore boats, nets, cruives, &c. which are only applicable to salmon-fishing. Fountainhall, 3d December 1701, Forbes *contra* Udney.

THE Lords found in a removing, That the saine of a barony, or third part of a barony or lordship, dispoñed to a party to be holden of a superior, did comprehend salmon-fishing, altho' the barony was not holden of the King; especially in respect that the saine bore him to be infest in the whole fishing, as well upon the sea as fresh waters, which was found to include salmon-fishing. Hope, (*Fishing*) Haddington, 20th February 1610, Campbell *contra* Prior of Ardchattan.

Privileges
accessory to,
and inherent
in a right of
salmon-fish-
ing.

SALMON-FISHING, being *inter regalia*, are privileged, and they who are infest by the King have thereby privilege to draw their nets to the nearest land, and slay their fishes thereupon, and to infix pails and trees adjacent to the river, where the waters ebb and flow, to mend and dry their nets; and albeit the said lands be bounded to the river, yet the heretor must leave as much next the river as is necessary for the foresaid use, and may neither till nor build dikes upon it, to hinder the commodity of the fishing. Haddington, 18th January 1612, Matthew *contra* Blair. ---- Found, That a party who is infest by the King in a salmon-fishing, having no lands adjacent to the water, may draw his nets and dry them on either side; and where one has lands on one side of the water, and another on the other side, with both of them a right to the fishing, 'twas found, that each may draw only on his own side. Haddington, 18th December 1623, Ld. Monimusk *contra* Forbes.

Cruives.

CRUIVES may be transplanted within the bounds of the heretor's possession, the former cruive dikes being demolished, so that the fishing above be in no worse condition than formerly. Stair, 26th January 1665, Heretors of the fishing of Don *contra* Town of Aberdeen. --- Here it was found, That the hecks need not be above three inches, and also that there must be a Saturday's sloop from six o'clock in the Saturday till Monday at sun-rising; but as for the liberty of the middle stream contained in the acts of parliament of King Alexander, and King James III and IV, the Lords before answer ordained witnesses to be led anent the consuetude, and afterwards upon report found it to be in desuetude. Stair, 29th July 1665, *inter eosdem*. Fountainhall, 18th March 1684, Barclay *contra* Scot. --- In a process at the instance of the upper heretors of a water, against a burgh to whom belonged

belonged part of the water below, for contraveening the acts of parliament regulating the wideness of the hecks, the Saturday's flop, &c. but especially for sheeting the cruives, *viz.* the putting a sheet all daub'd with pitch along them, which hindred the fish to pass up the water, tho' the town alledged it was only done at some times for gathering a dam to make their mill go in time of drought; the Lords found this sheeting an unwarrantable practice, and ordained the sheets to be taken down, and the hecks to be put up three inches wide. Fountainhall, 26th February 1704, Ld. Finhaven *contra* Town of Brechin. ---- The cruive dike ought only to be three elns broad, and a foot and a half high above the water, as the stream runs at ordinary times, from the middle of April to the beginning of May. Fountainhall, 15th November 1701, Falconer of Newton *contra* Scot of Comiston.

SANCTUARY.

THE Lords, upon debate among themselves, thought, That the abbay being his Majesty's house, should not exempt nor protect any person against his Majesty's laws, and the execution of his letters of caption; and therefore recommended to the keeper of the abbay to put the debtor out, and not to shelter him there. Dirleton, 7th January 1668, *contra*. ---- A man being incarcerated in the abbay upon a decret of the bailie thereof for a debt there contracted, whereon he was holden as confess'd, having been personally apprehended, the Lords repelled this reason of suspension, *viz.* That the decret was *a non suo iudice*, the said bailie having no jurisdiction for cognoscing upon debts. Some of the Lords doubted of the right to have a prison in the abbay, and thought that the suspender should have been transported to another prison; but this was overruled, because then his other creditors might have arrested him, which they could not do in the abbay, it being a sanctuary as well as a prison. Fountainhall, 12th June 1708, Cockburn supplicant. ---- Upon complaint of a party incarcerated, that he had been inticed on a Sunday by one of his creditors to come out of the abbay where he had taken sanctuary, and been detained by him at his house, under pretence of communing, till the clock struck 12 at night, and then taken with caption by a messenger, whom the creditor had ready at hand; all which contrivance was on the Lord's day, which he alledged was the same thing as if the caption had been executed on that day; the Lords allowed trial to be taken of the time of his being apprehended, and the manner how he was detained, or if he offered to go back to the abbay, and was inticed to stay or hindred to go out. Fountainhall, 21st July 1709, Halyburton *contra* Stewart.

THE Lords found, That the castle of Edinburgh is not a sanctuary to hinder execution of his Majesty's letters. Bruce, 15th December 1714, M'Kay *contra* Campbell.

S A S I N E.

Symbols of
infestment of
annualrent.

ONE being infest in certain lands, in order to uplift 600 merks of the readiest of the rent, the safine was sustained, tho' it neither bore delivery of a peny money like an infestment of annualrent, nor delivery of *earth and stone* like an infestment of property, but only *deliverance of the ground of the land according to the precept*, which precept was only related not engrossed in the safine. Stair, 23th December 1680, Lady Lammerton *contra* Ld. of Polwarth. — An objection being made against a safine, that it was null, because, being upon an heretable bond it wanted delivery of the symbol of a peny money, and only bore tradition of *earth and stone on the ground of the lands conform to the precept of safine in all points*; the Lords reduced the safine on this defect, Fountainhall, 20th January 1702, Ker *contra* Lady Vogrie. — It was objected against an infestment of annualrent that it was null, in respect that the safine, instead of the ordinary symbol of a peny money, bore only the delivery of earth and stone. It was answered, That there's no statute fixing the symbol of safines, that the delivery of symbols is only a formality to fix and ascertain the act of possession; and if such a symbol is truly delivered, as may manifest the intention and deed of the parties, it seems to be a matter of indifferency what the symbol is, whether a peny money for annualrent, clap and happer for mills, or earth and stone for lands, which last truly appears to be the proper symbol, instead of any other. The Lords repelled the objection. January 1729, Marquis of Clydesdale *contra* Creditors of Menzies.

Symbol in
resignations.

A SASINE within burgh, upon a resignation *anno* 1718, carrying the symbols of earth and stone, was found null upon the act of federrunt, 11th February 1708, declaring *staff and baston the only symbols to be used in resignations*, tho' the old custom had been long continued in the town of Aberdeen, where that safine was granted. 2d December 1729, Carnegy *contra* Creditors of Cruikshanks.

General
clause of tradi-
tion *cum omni*
juris solenni-
tate.

A SASINE of a mill was sustained, tho' it bore not (as was in the precept enjoined) *per terræ & lapidis traditionem, nec non lie clap & happer super fundis molendinorum*, seeing it bore safine to be given both of the lands and mill *per terræ & lapidis traditionem fundi bujusmodi terrarum & molendinorum, cum omni juris solennitate*; and this, altho' the party was never in possession by virtue of his safine, and the party contradictor was in possession. Durie, 15th March 1631, Lady Smeiton *contra* Vassals of Dunfermline. — The Lords refused to annul a safine of an annualrent, tho' it bore not to be taken *per traditionem denarii*, which is the ordinary symbol in such safines, but bore the same to be given and done according to the solemnities used in such cases. Durie, 23d March 1631, Somervell *contra* Somervell.

General
clause of state
and safine.

IN a competition for a salmon-fishing, the Lords sustained a safine, tho' it bore not expressly to be given *per traditionem cymbæ & retis*, but only in general, That the bailie came to the ground of the lands and fishing,

fishing, and others therein contained, and thereupon gave state and safine of the same; and in the clause, *acta erant hæc*, it said only, *Acta erant hæc super fundis dictarum terrarum aliarumque particulariter supra specificatarum*, which the Lords found sufficient. Durie, 21st March 1628, Maxwell *contra* Ld. Portrack. — A safine of a mill was sustained, altho' it bore not tradition of clap and happer, but only tradition of earth and stone; because it bore safine to have been given of the lands and mill, and that the same was done *super fundo dictarum terrarum, & infra dictum molendinum & domum ejusdem*. Durie, Spotiswood, (Mills) Hope, (Mills) 21st February 1629, Kennedy *contra* Graham. — Safine of a mill found sufficient, being taken in the mill-house, tho' it made no mention of the delivery of clap and happer. Haddington, 7th February 1611, Lady Pitligo *contra* Tenants. — A safine in a competition was sustained, altho' it bore not, that the same was given by delivery of earth and stone, or by such symbols as are usual in giving safines; but only carried that the bailie gave actual real and corporal possession of the lands, but no mention of any further tradition; but here the party, the bailie and the notary were all of a long time dead. Durie, 17th June 1630, Earl Wigton *contra* Earl Cassils. — The Lords sustained a safine, and repelled the following nullities proponed against it, *viz.* That the safine did not bear delivery of earth and stone of the grounds of the lands, in respect it did bear delivery of the ground of the lands; and the alledgeance, that it wanted these words, *actual, real and corporal possession*, in respect it did bear, that heretable state and safine was given conform to the precept of safine; and therefore sustained the said safine, but declared, they would deprive the notary if he were alive. Home, January 1682, Lady Lammerton *contra* Home. — The Lords found a safine of an annualrent null, because it did not bear delivery of the symbols contained in the precept, *viz.* the ground of the lands, and a peny money, as use is, but only in general, that the bailie had given state and safine conform to the tenor of the precept. Home, February 1684, Murray *contra* Hope.

A SASINE was found null, because it wanted the words, *vidi, scivi*, ^{Clause *vidi, scivi, & audi*} *& audi*. Hope, (Safine) 22d December 1612, Primrose *contra* Durie.

SASINE of lands and a tower was sustained, bearing, That the safine was taken of the lands and tower, altho' the clause of *acta erant hæc, &c.* made no mention of the tower, but only *in fundis dictarum terrarum*, tho' towers be *inter regalia*, and therefore would seem to require safine *per expresse*. Durie, 6th July 1630, Ld. Hermiston *contra* Butler.

A SASINE being quarrelled, because it carried both the bailie and attorney to be one person, who could not both give and take; the Lords, nevertheless, in respect it did appear evidently, that it was a mistake of the notary, seeing, by the first part of the safine it was clear, that there was a distinct attorney, who did present the safine to the bailie, did therefore incline to sustain the safine. Dirleton, 24th February 1676, Hilton *contra* Lady Cheynes.

Safine taken
in the night.

SASINE valid, tho' not taken in daylight. Stair, 19th November 1679, Arnot *contra* Turner.

SASINE unregistred what effect it has? See Registration.

SASINE in what cases a necessary solemnity? See Infestment.

SASINE where it must be taken? See Union.

BY whom it must be given? See Infestment.

SASINE how far probative? See Proof.

WHERE it must be registred? See Registration.

TRANSUMING of a safine from the prothocal. See Transumpt.

S A S I N E O X.

AS this prestation has no warrant in law, nor act of parliament, but only in custom; the Lords found, it could only be demanded upon the entry of the heir by virtue of his retour; and not in case of infestment upon resignation or confirmation, which may be so often changed, as may very much wrong the vassal. Haddington, 2d January 1594, Somervell *contra* Ld. Balvie.

IT was found, That the safine ox is due to the bailie of a regality, and that he is not accountable for the same to the Lord of the regality. Newbyth, 9th February 1667, Earl Haddington *contra* Jackson.

S E Q U E S T R A T I O N.

In what
cases it obtains.

IN a competition for mails and duties between a disponsee from an apparent heir, and a disponsee from the apparent heir's predecessor, who had been last infest, upon which disposition base infestment, confirmation by the superior and possession had followed; the lands, in so far as they were possessed by tenants, were summarily sequestred at the desire of the apparent heir's disponsee from the bar, without the form of a petition, or mention of sequestration in the libel, but refused as to such of the lands as were in the natural possession of the other disponsee. Durie, 17th July 1634, Lord Johnston *contra* Earl Queensberry.

A MAN's heir intending to reduce a deed of his *ex capite lecti*, and petitioning the Lords for a sequestration of the papers, tho' there was not so much as a summons yet raised; the Lords nevertheless ordained the haver to produce the whole writs in the Lord reporter's hands, that the apparent heir might have inspection thereof, and then appointed them to

to be inventared, and the inventory to be subscribed by the haver, and then the whole writs to be given back again to him to be made forthcoming to all parties who should be found to have interest therein. Fountainhall, 13th December 1684, *Suittie contra Hay*. — The apparent heir of a bankrupt being on death-bed, the Lords, at the creditors request, allowed all trunks, cabinets, &c. where his papers were, to be sealed and put in the clerks hands, and the party's own oath to be taken touching embazements, there being here *periculum in mora*, but refused to examine his wife upon a bill, seeing the reason for the husband's oath did not militate here, and this would evacuate all ordinary exhibitions. Fountainhall, 9th November 1697, Creditors of Stampfield supplicants. — Immediately upon a party's death, who had many papers belonging to others, his friends having summarily petitioned the Lords to seal and sequester the papers till friends might meet and inspect them; the Lords considering the act of federunt, 23d February 1692, tho' not precisely relating to the present case, did therefore, without intimating the bill, or allowing it to be seen, send one of their clerks for the end aforesaid, which the author says was singular. Fountainhall, 22d January 1704, Weir and others Supplicants.

REAL creditors in possession are never disturbed by a sequestration, nor would it be just, when their right of possession is derived from the proprietor in the way of lawful commerce; but a tacksmen of part of a sequestered estate, was found liable to accompt for his rents to the factor, notwithstanding of his having a real right upon the subject established in his person during the currency of the tack, because he could not invert the nature of his possession, reserving to him to plead preference upon his real right in the ranking. Dalrymple, 7th June 1707, *Catanach contra Frazer*. — In consequence of a process of sale, as nothing can be sequestered but the bankrupt's proper estate, an act of sequestration was not understood to reach lands possessed by proper wadsetters, or possessed by creditors upon tacks, because these are truly rights of property; and therefore, in a compt and reckoning betwixt the creditors and a factor upon a bankrupt estate, the factor was not found obliged to charge himself with the rent of such lands, but he was found obliged to charge himself with the rent of lands, that, at the commencement of the factory, were in possession of improper wadsetters or annualrenters. Forbes's MS. 27th January 1714, *Lady Cowhill contra Sharp*. — When an estate holding feu is sequestered upon the application of creditors, the superior's interest in the estate, which is a subject belonging to a different party, cannot be sequestered, and he therefore is entitled to levy his feu-duties by legal diligence, in the same manner as if there were no sequestration; upon this footing, a superior having applied to the Lords for a warrant against the factor for payment of his bygone feu-duties, was preferred to the agent of the sale, who at the same time also applied for a warrant against the factor, to have a sum put into his hand for carrying on the sale. 28th June 1738, *Duke of Roxburgh contra Oliphant*.

THE Lords refused to establish a factor upon a bankrupt estate, on a petition given in by divers creditors, in regard they were but personal creditors, and there was no ranking depending, and none but real creditors could seek summarily to dispossess the debtor; but the next day

In sequestrating bankrupt estates, what subjects are excepted?

Who may apply for sequestration of a bankrupt estate, and for a factor?

day some real creditors craving the same thing by bill, the Lords remitted it to one of their number to hear parties thereupon. Fountainhall, 24th December 1702, Creditors of Broomhall supplicants. — A competition having long depended among the creditors of a burdened estate, and the factor dying, the Lords, on a petition of the collector of the cefs of the shire, who had been forced for some years to pay the cefs of these lands, (they not being tenant-stead) out of his own pocket, named the collector himself to be factor, on his finding caution after his own payment of the cefs, to make the superplus forthcoming to all parties that should be found to have the best right. Fountainhall, 27th December 1711, Hunter supplicant.

Sequestration
on how taken
off?

A BURDENED estate being under sequestration at the creditors instance, and the heretor forfeited, and the forfeiture declared, the Lords nevertheless refused, at the donatary's desire, to remove the factor, tho' the donatary was come in the heretor's place, and offered caution to the creditors to make the rents forthcoming to them, according as they should be preferred; yet here the Lords thought it was reasonable, that the donatary might call the factor to an accompt how he employed the rents, that there might be no embazlement nor collusion. Fountainhall, 27th February 1697, Viscount Teviot *contra* Creditors of Dunfermline. — The like. Fountainhall, 7th June 1707, Catnach *contra* Fraser.

Sequestration
in hands of
one of the com-
petitors.

ARRESTED farms in a double poinding were ordained to be given up to the arrester during the dependence of probation of an alledgeance made by the other competitor, the arrester always finding caution to make the same forthcoming to the other party, if he, *in eventu*, should prove his alledgeance; and this, because the farms otherwise would remain unprofitable in the tenant's hands, or the tenant in the mean time might become insolvent. Nicolson, (*Double poinding*) *penult.* March 1624, Law *contra* Lundie.

SERVICE and CONFIRMATION.

Subjects,
whether to be
taken up by
service or con-
firmation?

A BOND containing substitutions, not confirmable even by an executor-creditor. Home, January 1728, Sinclair *contra* Gibson.

Heirs have
right to tacks
without ser-
vice.

IN comprising a tack from the debtor's representative, found, That there needed no special charge to enter heir, because the heir had right to the tack without a service. Durie, 19th June 1635, Rule *contra* Home. — Heirs have right to tacks *sola existentia*, without necessity of service. Stair, 17th June 1671, Boyd *contra* Sinclair. — The like. Stair, 9th July 1675, Home *contra* Johnston. — But tho' the apparent heir may brook, he cannot assign the tack without being served. Durie, Haddington, 14th February 1623, Rattray *contra* Graham. — A purchaser at a publick roup, craving deduction of a part of the price effeiring to the value of the teinds, of which there appeared

appeared to be no right in the defunct proprietor's person; for tho' there was a long tack of the teinds, in favours of the family, yet the bankrupt, when he made up his title to the lands, neglected making up a title to the tack; the Lords found, That the bankrupt, who was in possession of the tithes upon the tack, had right to the tack without a service, so as to be carried out of his person, either by voluntary or legal conveyances. 16th February 1739, Campbell *contra* Cunningham.

A SUM in a bond being payable to a man, or, he being deceased, to his son, and, after the creditor's decease, one of the debtor's cautioners having paid the debt, and taken assignation thereto from the son, the Lords found it was not a naked assignation, but in a manner a discharge, which, tho' the son was not confirmed executor, they thought he might give even *ante sententiam hoc attento maxime*, that he was the person to whom the money was destined to be paid in the bond. Spotiswood, (*Executor*) 10th January 1627, Ld. Wauchton *contra* Hamilton. — Persons *nominatim* substituted in bonds, need no service or confirmation. Stair, 4th February 1680, Robertson *contra* Preston. See Durie, 15th January 1630, Thomson *contra* Merkland. — In a mutual substitution of two daughters to each other *nominatim*, the subject, by the death of the one, was found to belong to the other, without necessity of confirmation. Stair, 5th December 1665, Hill *contra* Maxwells.

In what cases a service requisite to a *nominatim* substitute?

AN heretable bond being payable to a father, and, after his decease, to his two sons *nominatim*, all three were infeft *unico contextu*, the precept of sasine being in the same terms; tho' the sons were only here substitutes, yet the Lords thought that their infeftment did supply the necessity of a service. Stair, 23d July 1675, Ld. Lamington *contra* Muir. — A party having taken a disposition of lands to himself in liferent, and to his eldest son, his heirs and assignees, in fee, which failing, to his second son, his heirs and assignees, &c. upon which all were infeft by symbols given to the father for himself, and as acting for his two sons named in the instrument of sasine; and after the death of the eldest son, the second being served heir in general to his brother, and then disposing the lands to his eldest sister; in a competition after his decease betwixt her and her second sister's son infeft as heir in special to his eldest uncle, the Lords found the eldest brother fiar, and the second only substitute, who, without being served heir in special, could not dispoise, and therefore the disposition granted by him, was *a non habente potestatem*, and found the second sister's son not obliged to serve heir to him, who was but served heir in general to his eldest brother. Fountainhall, 11th February 1708, Ker *contra* Howieson. — Lands being disposed to one, and, failing of him by decease, to his eldest son, and the heirs-male of his body, which failing, to the second son and the heirs-male of his body; and the eldest son having survived the father, and died thereafter without serving heir to him, the Lords found the right to the lands disposed, not fully vested in the person of that son without a service, and therefore allowed the second son to be served and retoured heir to the father. Forbes's MS. 2d, 10th June 1714, Hamilton *contra* Hamilton. — The like. Bruce, 21st January 1715, Hamilton *contra* Creditors of Orbiston. — John Douglas resigned his lands in fa-

vours of himself, and the heirs-male of his body, which failing, to Hector Douglas *nominatim*, and infeftment was expedite accordingly; John Douglas having died without heirs-male of his body, Hector disposed the lands without making up titles; after his death the disponee insisting upon his right, it was found that Hector was only a substitute, and could have no right to the lands without a service. 10th July 1731, M'Culloch *contra* M'Leod.

General disposition of heretable subjects; requires not a service.

OCCURRED in a process, if a general disposition was a sufficient title without any thing done upon it, to carry an heretable subject, such as a bond secluding executors: It was contended not to be sufficient more than a general disposition of moveables, because it is destructive to creditors, that a representative should be liable no further than *in valorem*, and at the same time no check upon him to ascertain the extent of his intromissions. Answered, Our law has gone farther to secure creditors than perhaps the law of any other country, but there is nothing of human composition absolutely free of defects; it has always been held that a general disposition is equivalent to a general service, and this must obtain, till a new law be made, whatever inconveniencies it be attended with; the Lords sustained the general disposition. July 1718, Grant *contra* Grant.

Special assignation of moveables.

AN assignation, tho' intimated after the cedent's death, was found not to need confirmation. Stair, 27th July 1664, Muirhead *contra*. — Found, That an assignation not being intimated in the cedent's time, (and consequently the debt being *in bonis defuncti*) ought to be confirmed; yet where the debt was small, their Lordships sustained process at the assignee's instance, he finding caution for the *quot*. Dirleton, 24th November 1666, Govan *contra* Paip. — An assignation, tho' on death-bed, yet being *ad modum actus inter vivos*, intimated during the cedent's life, does sufficiently denude and convey without necessity of confirmation. Falconer, 15th March 1683, Sandilands *contra* Sandilands. See act 26, parl. 1690.

Special legacy.

CAPTAIN George Campbell in his testament, having legated to his wife the special sum of L. 1000 Sterl. due by Campbell of Calder to him by bond; it was found, that this being a special legacy needed not confirmation. January 1729, Gordon *contra* Campbell.

Service or confirmation if requisite, where the subject is in possession of the heir or executor?

A PARTY succeeding as heir to a collateral kinsman, who, at his decease left a child his heir in nonage, who died without being entred, the said next heir having conveyed his child's tutor for intrometting with the heirship; the Lords refused to sustain action against him, because the defunct at his decease had an apparent heir, *sciz.* the defender's pupil, and who, as such, might lawfully intromet with the goods, notwithstanding the child was never entred, because an apparent heir may possess heirship goods and dispose thereupon, altho' he cannot pursue for the same, if out of his hands. Hope, (*Heir*) January Haddington, 2d February 1610, Blackburn *contra* Rig. — A clock-maker, who had bought a clock from an apparent heir, being pursued by the executors for delivery of the same, it being confirmed in the testament; the Lords, notwithstanding it was heirship goods, yet ordained the clock to be delivered to the executors, they finding caution

caution to make the same forthcoming to the heir when he should be served, or to the creditors, when they should affect the same. Auchinleck, (*Heir*) 22d December 1630 *contra*.

AN assignation *omnium bonorum* will not be sustained without confirmation, but for so much as the assigney has acquired possession of, or moved action for in the cedent's lifetime. Haddington, December 1610 *contra*. — A father having disposed all his moveables to his son, and entred him into possession before his death; and he being charged by the commissary and his procurator-fiscal to confirm; in a suspension of the charge, the Lords found, That he was obliged to confirm, in respect of the generality of the disposition, and of a clause reserving power to the disposer to dispose upon his moveables at his pleasure. Stair, Newbyth, 4th July 1665, Commissary of St. Andrews *contra* Bouffie. — The like. Stair, 23d June 1665, Procurator-fiscal of the commissariat of Edinburgh *contra* Fairholm. Gosford, 25th July 1676, Finlay *contra* White. But now since act 26, parl. 1690, superseding the necessity of confirmation, a general disposition of moveables is a good title to maintain possession, tho' not to pursue: But in such a case the creditors of the defunct were found entitled, upon application to the Lords, to have the goods inventoried and valued, in order to found a proper charge against the dispo-see. Forbes, 8th July 1707, Dobie *contra* Oliphant. — The Lords found a general assignation *omnium bonorum* to be a sufficient right to retain moveables in the assigney's custody, without necessity of confirmation, in a competition with an executor decerned, who had a licence to pursue, but had not confirmed. Forbes, 22d November 1711, Dickson *contra* Logan.

FOUND, That a relict intrometting with some particular things omitted in the defunct's testament, and not confirmed, might be directly pursued for the same by creditors, without either first insisting against the executors confirmed, or taking a dative *ad omiffa*. Durie, 5th February 1623, Schaw *contra* Auchinleck. Durie, 18th March 1624, Cant *contra* Cheesly. Durie, Spotiswood, (*Universal Intrometter*) 20th June 1629, Douglas *contra* Toures. Durie, 28th March 1632, Maxwell *contra* Lady Stanlie. Fountainhall, 28th January 1678, Anderson *contra* Anderson. — A relict having intrometted with moveables, to which she had a gratuitous right from her husband, *retenta possessione*, it was found that the creditors had a direct action against her, without necessity of confirming executors-creditors. Stair, Gosford, 16th June 1671, Bowers *contra* Lady Lindores. — Process was sustained at a creditor's instance against an intrometter with the defunct's effects, and that even without calling the representatives of the defunct. Durie, 9th December 1626, Lord Blantyre *contra* Forsyth. — A defunct's creditor is not obliged to confirm *ad omiffa*, if he can prove by the oath of the executor confirmed, that he the executor intrometted with goods not confirmed sufficient to pay the debt, for in such a case the executor will be directly decerned to pay. Durie, 24th January 1639, Inglis *contra* Bell.

PROCESS was sustained at a relict's instance against her daughter and son-in-law, for recovering of some goods that pertained to her husband the time of his decease, notwithstanding it was alledged, the pursuer could only have action for her own part of the goods; and this was found,

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because

Intrometters with the defunct's effects may be pursued directly without confirmation.

because of the pursuer's possession divers years before the defenders intromission, and since her husband's decease, and that she offered caution to warrant the defenders at all hands, and that the defenders were not decerned nor confirmed executors to the defunct. Durie, 6th December 1628, Cranston *contra* Adifon.

WHAT understood a general Affignation? See General Affignation.

SERVICE OF HEIRS.

What court
competent to
service?

BRIEVES may be directed from the chancery to any judge to serve a man heir in general, tho' he does not live within that jurisdiction. Durie, 6th March 1630, Ld. Caskiebane supplicant. — The Lords found, That service of brieves of lands lying within a regality (if the Lord thereof have any claim to the property of the lands) ought to be by commission to the macers or others, notwithstanding of the Lord of regality's privilege. Colvil, March 1589, Carmichael *contra* Earl Angus.

Bailies within
burgh may
enter by pre-
cept of *clare*.

BAILIES within burgh may enter an apparent heir by precept of *clare constat*, as well as by hamp and staple. Gilmour, July 1662, Lockhart *contra* Kennedy.

Tenor of the
brieve.

THE service of an inquest was sustained, altho' it mentioned not the lands to be holden either feu, blanch, or ward; but only that they held of a prelate for keeping his castle. Sinclair, 16th March 1548, The Queen's advocate *contra* . ---- In a general service to a grandfire's grandfire, the party's claim, bearing, That the predecessor to whom he desired to be served, died at the faith of King James III. or some of his successors Kings reigning for the time; the Lords thought the claim relevant, altho' the same bore not precisely in what King's reign the said predecessor died, which could not be proved *in facto tam antiquo*, neither necessary precisely to be proved, but that it was enough if it were found, that he died at the faith of the King then reigning. Durie, 22d July, Auchinleck, (*Brieves*) 27th July 1629, Earl Caffils *contra* Earl Wigton.

Form of
proceeding.

FOUND, That a party being summoned to pass upon an inquest and service of a brieve, and thereafter declining, may presently be put to the horn at the head burgh of the shire where he lives. Colvil, June 1586, King's advocate and Moncur *contra* Moncur. ---- If any one of an inquest maliciously absent himself, the rest cannot proceed, altho' he compeared at the first, and therefore the Lords in that case are in use to grant warrant for putting another in his place, as if he were dead or forth of the country. Colvil, April 1583, Ld. Gadzeath *contra* Sheriff of Air.

A SERVICE was found null, because the judge continued the brieve to another day without consent of the party. Balfour, (*Brieves*) 24th February 1595, Ogilvie *contra* Bailies of Dundee.

THE

THE party desiring to be served, ought to be special upon the defunct, and persons intervening betwixt him and the defunct; the instructions whereof must be made not to the judge but to the inquest; and the party compearing against the service ought to see the writs produced to verify the same, that he may object what he has to say against the service. Auchinleck, (*Briefes*) 22d June, Durie, 27th July 1629, Earl Caffils *contra* Earl Wigton.

THE one half of an inquest being of one opinion, and the other half of another, and the Chancellor being *non liquet*, the Lords found, That he may be compelled *remediis prætoriiis* to give his casting vote either for the one or the other side. Balfour, (*Briefes*) 5th March 1554, Ld. Dunipace *contra* Lord Oliphant.

A DECRET was found null and turned into a libel, founded upon a general service without a retour, because the brieve of Mortancestry is one of the retourable briefes and an incomplete act till the retour, by which only it becomes a sentence; the service being only the report of the verdict on the commission directed to the inquest. Fountainhall, 2d February 1698, M'Intosh *contra* M'Intosh. Service must be retoured.

A SERVICE before the bailie of the regality of Dunfermline who has his own chapel, was sustained without retouring to the chancery. Durie, 8th December 1631, Ld. Cleish *contra* Sanders. ---- A retour of a man, as general heir to his father, served in the town of Glasgow, and retoured to the King's chancery, sustained to be a title of his pursuit, because the bishop opposed not; tho' the town, notwithstanding of its being a royal burgh, was affirmed to hold of the bishop, to be of his regality, and to pay its mails to him. Haddington, 17th January 1611, Anderfon *contra*. Where it must be retoured?

ONE may be served heir to a rebel who died at the horn, notwithstanding the clause in the brieve, requiring to cognosce that the defunct died in the faith and peace of our sovereign Lord, which was found only to respect forfeiture, and not civil rebellion. Durie, 21st November 1626, Seaton supplicant. Civil rebellion bars not service.

THE service of an heir cannot be stopped by a disponee deriving right from the defunct without infeftment, upon the pretext that it was *frustra*, unless the heir could quarrel the disposition, tho' the disponee was willing instantly to debate the point of right; for if an apparent heir were pretending to quarrel his predecessor's disposition, it would be a good objection, that he could not insist in the reduction without being served; therefore *e contrario*, a disposition cannot afford a sufficient objection to stop a special service. 20th July 1733, Sir James Suttie *contra* Duke of Gordon. Disposition without infeftment bars not a special service.

A GENERAL service does not carry even the personal obligation in an infeftment of annualrent, so as to be a title to demand payment, which the heir cannot insist for until he be also infeft. January 1729, Competition betwixt Lord Halkerton and Drummond. General service what it carries?

FOUND, That a special service doth give right to heretable bonds, and all other heretable estate whereupon infeftment did not follow, and includes Special service what it carries?

includes a general service, as *homo* doth include *animal*. Dirleton, 8th February 1676, Riccarton-Drummond *contra*

HEIR-MALE taking out a service tanquam legitimus & propinquior hæres. See Representation.

S E R V I C E (personal.)

DUTIES of land consisting in services, yearly payable, *e. g.* leading hay, corn, dung, if not yearly required *debito tempore*, the debtor is not liable for any prices in lieu thereof. Durie, 30th January 1624, Ld. Carnoufie *contra* Keith. — Found, That the service of weekly carriage of fish to the superior's house by his vassal being *onus personale*, was only due if required. Newbyth, 26th June 1666, Ld. Wedderburn *contra* King. — Found, That carriages and other such services contained in a feu-charter prescribe every year if they be not annually required, because the vassal may have horses for single carriages that cannot give double ones; but this was not extended to kain-fowls and other casualties, which may be sought at any time, if not cut off by the triennial prescription. Fountainhall, 13th December 1693, Feuers of Kinross *contra* Sir William Bruce.

IN a contract of marriage the husband becomes bound to deliver to his future spouse weekly, during all the days of her life after his decease, upon any of his coal-bills nearest her dwelling and residence for the time, twelve loads of coals free of all expence; in a pursuit for these coals at the instance of the wife's executors, for several years that she had made no demand for them, being provided *aliunde*, the defence was, That this was of the nature of a service similar to an obligation to win peats, which admits of no value, if not demanded. Answered, The coals were *de facto* sold by the heir, and he ought to accopt for the price. Replied, He could have won as many coals as would have served the liferentrix, and at the same time have answered all the sale that he could find for his coals, so that it cannot be said he sold the liferentrix's coals. Had she made the demand, he would have caused bring up twelve loads more *per week* than *de facto* he brought up; and as she made no demand, the coals that would have been her's remain in the coal-heugh to this day. The Lords notwithstanding sustained the claim. 6th February 1734, Henderfons *contra* Henderson of Fordel.

S E R V I T U D E.

Right of servitude established by consent and possession without *fasine*.

SASINE is not necessary to the constitution of a servitude, consent with possession is sufficient. Durie, 26th January 1622, Turnbull *contra* Lord Blavern. Durie, 11th March 1630, Town of Edinburgh *contra*

contra Town of Leith. — The Lords sustained a servitude of common pasturage upon a simple writ granted by the then heretor of the barony, notwithstanding the licence wanted charter and sasine, and that the lands were in the person of a singular successor. Auchinleck, (*Servitude*) 7th December 1632, Ld. of Pennymuir, &c. *contra* Wedderburn. ---- Found, That a bond of astrictiō of multures does not prejudice the singular successor in the lands, unless the creditor in the bond acquired possession conform, before the singular successor's right, and that till then it was but a personal right. Marcus, Appendix, (*Thirlage*) 12th December 1673, Pittarow *contra* Stewart of Redmire. ---- Found, That a bond of liberty to run levels through the granter's ground not clothed with possession, is not a real servitude; but the Lords inclined to sustain inhibition upon the bond as sufficient possession. Marcus, (*Servitudes*) January 1686, Blair *contra* Creditors of Carberrie.

A BOND of thirlage was found a real servitude good against singular successors, tho' no other possession was proved upon it, but barely What possession sufficient? that the granter used sometimes to go to that mill, and as oft to other mills. Forbes, 26th July 1712, Blair *contra* Edgar.

THE Laird of Ardross having built a church at the Ely, and local- Difference betwixt servitudes and personal rights. led a stipend to it upon several parts of his lands by a private mortification, which was quarrelled by a singular successor after the minister had been above 40 years in possession; the Lords found, That the mortification being constituted only by way of grant, obliging the mortifier and his heirs, &c. and not by a real right, it was not real by possession, like a servitude, to be effectual against singular successors. Marcus, (*Infeftments*) March 1682, Wilson *contra* Wauch and White. ---- Found, That a bond of thirlage to a person's mill, for payment only of outfucken multure, being clothed with possession, was a real servitude against the granter and his singular successors. Marcus, (*Servitudes*) January 1686, Peter *contra* Lady Eccles. ---- Two tradesmen who had rebuilt a burnt land within a burgh in felling off the several storeys, having taken the several purchasers in their dispositions bound to contribute their shares and proportions towards repairing and upholding the roof; and the purchaser of the lower storey, who had accepted his disposition with that quality, having infest his wife therein without mentioning any such burden in her disposition, and in a process against her for her proportion of the reparations, this being alledged to be a servitude, which therefore must affect singular successors; the Lords thought, That if it was once yielded to be a servitude it needed no infeftment, but could be constituted by a personal clause; only they knew that it was not generally observed within that burgh, but only when provided by paction, and that if this were once allowed, then other unheard of servitudes might be introduced; therefore they found, That this was no real servitude, but only a personal obligation on the deceas'd husband, and assilzied the relic't from any part of the reparations of the roof. Fountainhall, 19th February 1708, Nicolson *contra* Melvil. ---- One having given, by a writ under his hand, liberty and privilege to a neighbouring heretor to cut timber in his woods, for the use of the neighbouring heretors lands and tenandry, the Lords found this a real servitude, and good with possession against singular

singular successors. 27th November 1734, Garden of Bellamore *contra* Earl of Aboyne.

Servitude
implies a pro-
per dominant
tenement.

THE erection of a town into a burgh of barony, found not to afford the incorporation of burghesses and inhabitants a title to acquire a servitude of pasturage by prescription. 22d November 1732, Feuars and inhabitants of Dunse *contra* Hay of Drummelzier. --- But an infestment of a house, with or without a yard, found a sufficient title to the proprietor to prescribe a servitude of pasturage. 24th November 1732, *inter eosdem*.

Mutual du-
ties betwixt
the proprie-
tars of the ser-
vient and do-
minant tene-
ments.

FOUND, That when one hath the servitude of an aqueduct to a mill through a neighbour's ground, the person who hath the benefit of the aqueduct (and not the party servient) is liable to maintain the same, so as the adjacent grounds receive no prejudice by the water. Marcus, (*Summons*) July 1687, Parson of Dundee *contra* Inglis. --- But where the prejudice done to the neighbouring grounds by re-stagnation did arise not from the insufficiency of the dam-dikes, but from the running in of mud and gravel by speats and land-floods, the proprietor of the mill was found not obliged to clean the dam, the re-stagnation of the water not being occasioned by any *opus manufactum* of him or by his neglect, but that the proprietor of the servient tenement might clean the dam if he pleased, November 1731, Car-lile of Limekilns *contra* Douglas of Kelhead. --- A tenement having a servitude *oneris ferendi* of joists and laid-to chimneys upon another tenement that was ruinous; the Lords found, That the proprietor of the servient tenement who had taken it down in order to rebuilding, must not only build the wall in the condition it was formerly for sup- porting the said joists and laid-to chimneys, but also that he must build and lay to the chimneys as they were before the taking down thereof at his own expences: And this, unless the wall or gavel was so ruinous, that the taking down thereof was necessary; in which case they found, That the proprietor of the servient tenement was bound to the expen- ces in taking down, but not of putting up again. Bruce, 24th June and 14th July 1715, Murray *contra* Brownhill.

Servitude
may be restri-
cted to the ne-
cessary use.

A SERVITUDE of feal and divot being constituted in a muir, it was found, That the proprietor had power to restrict the servitude to such a part of the muir as might be sufficient for the use. Stair, Dirleton, 21st June 1667, Watson *contra* Feuars of Dunkenan. --- A servitude of common pasturage and fuelling hinders not the proprietor to rive out the commonty and labour the same, yet so as whatever lies lee must be liable for the promiscuous pasturage, and the most convenient places for fuel must be designed exempted from labouring. Stair, 20th January 1680, Earl of Southesk *contra* Ld. of Melgum.

Souming and
rouming.

WHERE there is a joint property, any of the proprietars may pursue for souming and rouming, but not where the property belongs to one, and the restricted servitude to another. Stair, 23d January 1679, Dunlop *contra* Ld. of Drummelzier.

Servitus lu-
minum.

IN a declarator of a *servitus luminum*, the Lords decerned, That notwithstanding such a servitude the defender might build any thing he

he pleased, and to what height he pleased, at an eln's distance, where-
by the light would be free, and that he was not obliged to keep at a
greater distance even in the country. Fountainhall, 5th February
1678, Ogilvie *contra* Donaldson.

A PROPRIETAR of a mill had been 40 years in possession of a ^{Servitude of}
dam-head upon another man's property, and the ground being washed ^{a dam-head.}
away by a speat, he was found to have right to extend his dam till it
touched the firm ground in the servient tenement; tho' it was plead-
ed, That all he had a right to do was to make up the breach in the dam,
and restore it to its former situation, but not to make new incroach-
ments. Stair, 20th July 1677, Laird of Gairleton *contra* Ld. of
Stevenson.

THE Lords found, whose charters carried them to the privilege of ^{Servitude of}
digging stones in the quarry of a commony belonging to the superior ^{feal and divor}
and his tenants, had thereby also right to cast feal and divot, and to ^{if it implies}
pasture there, they proving that they were in use so to do, tho' within ^{pasturage?}
the years of prescription. Bruce's MS. 28th July 1716, Ld. Meldrum
contra Feuars of Old Meldrum.

SOCIETY.

TWO men having contracted for a bargain of victual, which the ^{What un-}
seller was obliged to deliver to them equally, and he having de- ^{derstood a so-}
livered the whole to one of the buyers, who was his own son-in-law, ^{ciety?}
pursued the other for the half of the price. The defender alledged,
That he could be liable for no part of the price, having got none of the
victual, and the conjunct buyer, who received the whole, was now in-
solvent. Answered, The buyers being *socii*, delivery to any one of
them was sufficient. Replied, *Emptio rei facta a pluribus emptori-*
bus infers no society, where there is no *contributio lucri & damni*.
The Lords assilzied the defender from payment of any part of the
price. Harcus, (*Society*) February 1682, Neilson *contra*
M'Dougal.

By an act of the mason-lodge of Lanark, "all members are dis- ^{A society}
charged to receive or to be witnesses to the receiving or passing any ^{cannot sue uni-}
"mason within ten miles of the burgh of Lanark, except the benefit ^{less incorpo-}
"come to the lodge, under the penalty of ten pound." Upon this ^{rate.}
act process was brought against some of the members to accompt for
sums they had received by apprentices and otherwise, the benefit of
which ought to have accrued to the lodge, and concluding ten pound
Scots of penalty for the contravention of the said act, *toties quoties*.
It was objected, That no set of men can, by their mere will, incorpo-
rate themselves, and there can be no action at the instance of the so-
ciety, unless they were incorporated, whatever action there may ly at
the instance of one or more particular members. It was found, That
the lodge had not *personam standi*, and could not sue. 11th June
1730, Lodge of Lanark *contra* Hamilton.

Contribution
of pains in-
stead of stock.

IN a society of two, where the one had contributed money, and the other (who was an artist) had contributed only his pains and personal labour; the Lords found, that this last could claim nothing on account of his pains, seeing that was all he conferred to the society in place of money. Fountainhall, 9th December 1696, Brock *contra* Brown.

Acquisitions
made by a
partner relat-
ing to the so-
ciety, must be
communicat-
ed.

SIR Alexander Napier and others in copartnery, purchase lands by contract, without *saſine*; the disponer's liferent-*escheat* falls, and is gifted to Sir Alexander; the Lords found, That he could not be preferred as a stranger donatar would be, being a partner who could do no deed in prejudice of the society, but behoved to communicate. Durie, 26th March 1624, Inglis *contra* Austine.

How far a
partner can
bind the socie-
ty.

THO' one of two partners cannot warrantably freight their ship without the others consent, yet being done, it was not found to import the making up of the ship, which had perished by accident. Stair, 22d July 1673, Swyne *contra* Abernethy. The point in debate was, whether one in a society submitting to arbiters for himself and company their joint affairs, can bind thereby the company? It was objected, That indeed one partner can bind the whole with relation to every deed of ordinary administration; that is, such deeds which tend directly to the advancement of their joint concerns, and without which their business cannot be expedited; but a submission is no such deed, for that lies entirely out of the common course of their trade; and therefore a power of submitting for the society, is never understood to be communicated to the partners, since matters may be happily carried on without the supposition of any such power; the Lords found the submission of one partner does not bind the company. November 1728, Lumisdén *contra* Gordon.

Company, if
liable for the
price of goods
bought by a
partner?

LOGY sold Moncrief five hogsheds of wine, for the price of which, after Moncrief's bankruptcy, he pursues Adolphus Durham as copartner; it appeared by the defender's books, that the wines in question were brought into the society, and divided betwixt them, and posted down as bought from Logy *nominatim*; but Adolphus does not state himself debtor to Logy, but to his partner, and, in another part of the book he gives his partner credit for the sum, which was equivalent to payment; from this the pursuer argued, That the defender knowing the wines to be his, could not be in safety to pay the price to his partner. Answered, The wines were sold to Moncrief, whose faith the pursuer followed, not so much as knowing of the copartnery, and whatever is done *extra fines societatis* does not bind the *socii*. The Lords argued, If the pursuer had bought from Moncrief any society goods, Adolphus would have action for the price, tho' Moncrief had sold them in his own name, *ergo, e converso*, the pursuer ought to have action against Adolphus, tho' the wines were sold to Moncrief, and he followed his faith alone. Fountainhall, 30 December 1697, Logy *contra* Durham.

A partner
preferable for
his advance-
ments upon the
cargo.

THREE Glasgow merchants having join'd in an adventure for the purchase of tobacco from Virginia, and one of them Henry M'Caul, having died bankrupt before the division of the cargo was completed; in a competition betwixt his proper creditors and the other two partners,

ners, who were considerably in advance upon account of the cargo, the Lords found the partners had right to retain the deceased M'Caul's proportion of the cargo of tobaccoes, until they were relieved of all advancements and engagements on account of the said cargo. It was yielded by M'Caul's creditors, That in a proper copartnery, where there is a society and company under a known designation, no extraneous creditor of any partner can be allowed to draw out of the company more than the free stock belonging to his debtor, but it was contended to be otherwise in a transient joint adventure, in which, if one partner be in advance, he has no more than a simple personal action against the others. To which it was answered, That tho', in this case, the parties concerned were not properly *socii*, but only proprietors *pro indiviso*; yet, until the division be made, they are each in possession of the whole *pro indiviso*, and each is intitled to retain possession until he is relieved of the engagements undertaken on account of the cargo, and thereby is preferable to the diligence of extraneous creditors of the other parties concerned. 11th January 1740, Creditors of M'Caul *contra* Ramsay and Richie.

SOCII liable in solidum or pro rata. See Solidum & pro rata.

Solidum & pro rata.

A CAUTIONER bound as full debtor with the principal, found liable to pay the whole without division. Durie, 26th January 1631, Ld. Cloverhill *contra* Ld. Ladylands. — Some copartners in the tack of the common good of a burgh, having bound themselves as coprincipals and full debtors, but without the usual words, *conjunctly and severally*, the Lords considering that they were in a society, found the words, *full debtors*, made them all liable *in solidum*. Forbes, 26th, Fountainhall, 31st December 1707, Cleghorns *contra* Yorkston.

Obligants bound as coprincipals and full debtors.

Two parties being bound conjunctly to redeliver a particular corpus, or, in place thereof, a certain sum, the obligation was found divisible, and each liable *pro rata*. Durie, Spotiswood, (Contract and Obligation) 20th January 1630, Ld. Urie *contra* Cheyne. — A town being bound to a person in a sum for doing their affairs, and he taking bond for the same from 14 persons, all bound *in cumulo*, but not conjunctly and severally, the Lords found, That each of these 14 persons was bound *in solidum*, notwithstanding the conception of the bond, and that because the town itself was so bound. Durie, Spotiswood, (Contract and Obligation) 10th February 1631, Provost of Inverness *contra* the Town. — Two persons having taken a tack, and having possessed a year or two *per tacitam relocationem* after the expiration thereof, one of the two (the other being dead) being charged for the whole tack-duty that was due since it expired; the Lords thought, That the suspender, in equity, was free, but seeing the tack was set to both of them *pro indiviso*, without distinguishing their

Bound conjunctly only. And, imo, in a divisible prestation.

shares of the possession, the obligation was indivisible, and therefore decerned, reserving relief. Fountainhall, 18th February 1704, Brown *contra* Paterfon.

2do, In an
indivisible
prestation.

THE three overseers of a minor having become bound to cause the minor grant a certain relief, one of them was charged *in solidum*, the obligation being *ad factum præstandum*. Answered, The obligation being *factum alienum* imprestible by the overseers, the damage and interest succeeding in place thereof is divisible; which was sustained and the defender found liable only *pro rata*. Gosford, 15th, Stair, 16th July 1669, Denniston *contra* Semple. — Two owners of a ship having agreed to carry some barrels of beef to Leith, and having failed, were pursued for damage and interest, the Lords found each of them liable *in solidum*, for this reason, That tho' damage and interest terminate in a sum, yet seeing *subiit vicem facti*, it behoved to be ruled by the principal obligation, which consisting in *facto*, they found, That according to the meaning of parties in trade, who contract summarily and plainly, each of the owners was to be liable in the whole performance. Stair, Dirleton, 14th June 1672, Sutherland *contra* Grott. — A parish being bound to put out a soldier, and one having done it, and pursuing only some of the rest for reimbursement of his expences, the Lords found, That in *præstatione facti*, such as the delivery of a soldier, all were liable *in solidum*, reserving their relief as accords against the rest of the contributors for their fractions. Fountainhall, 24th December 1697, Dickson *contra* Turner. — If an obligation to retire a bond, or a sufficient discharge be such a *factum individuum*, as to bind each of many obligants *in solidum*, disputed betwixt Mr. Patrick Grant and Strachan. Home, 6th July 1721.

3tio, If one
of the obli-
gants become
bankrupt?

Two parties having bought a wood, without adjecting in the contract, the clause conjunctly and severally; the Lords found, That one becoming insolvent, the other was liable *in solidum* for the whole price. Fountainhall, Forbes, 16th December 1710, Musket *contra* Harvie. — Two being bound as principal debtors, without mention of conjunctly and severally, the bond importing, that the money went entirely to the use of one, he becoming bankrupt, the other, as cautioner, was found conveyable *in solidum*. Home, 6th July 1721, Grant *contra* Strachan. — Three persons having wrongously meddled with a ship, one of them was found liable *in solidum* for the price thereof, and damages, the ship being *corpus indivisible*, and the other parties being insolvent. Stair, 22d February 1668, Strachan *contra* Morison.

If the sub-
scription of one
of the obli-
gants be null,
or be not adhi-
bited?

FOUND, That two parties being insert conjunctly in an obligation, one of them not subscribing, the other was only bound for the half. Erskine, 2d June 1593, Scot *contra* Jamieson. — A bond bearing the names of two persons obliged, binding them conjunctly, but not conjunctly and severally, and being only subscribed by one of them, the subscriber was decerned to pay the whole sum. Durie, Spottiswood, (*Contracts*) Haddington, 13th February 1624, Sinclair *contra* Sinclair.

Action for
relief among
correi.

CURATORS have relief of each other, and therefore one of them taking assignation from the minor to the whole, and pursuing the others; action was only sustained against them *pro rata*, tho' he pursued in

in the minor's name. Durie, 11th February 1630, Guthrie *contra* Guthrie. — Five or six persons having put out a caper, and taken a prize, and a decret being recovered by the stranger owner for the value of his ship, in which the partners were all decerned *in solidum*; and one of them upon payment having taken an assignation, and pursuing another of the owners, who alledged he could only be liable *pro rata*; the Lords found, That the pursuer, having an assignation, might pursue the defender for the whole, with deduction of the pursuer's own share, and of the shares of the notourly insolvent copartners. Marcus, (Cautioners) March 1684, Smeaton *contra* Ld. Kinninmond. — One of several *correi debendi*, bound conjunctly and severally, having paid the debt, upon the creditors discharge, without getting an assignation; the Lords found him entitled to repetition from the rest of the solvent co-obligants, only *pro rata* of what he paid more than his own share, and for the proportions of those who were insolvent at the time of the payment. Forbes, 21st, Fountainhall, 22d December 1710, Craigie *contra* Heretors of Orkney. — The principal debtor having granted a bond of corroboration with a cautioner, there was found to be a mutual relief betwixt the cautioner in the original bond, and the cautioner in the bond of corroboration, equally as if bound *simul & semel* in the same deed. Marcus, (Cautioner) February 1685, Ker *contra* Gordon. Fountainhall, 18th December 1701, Loch *contra* Lord Nairne. Home, 15th December 1722, Murray *contra* Creditors of Orchardtoun. — The like, where the principal debtor had suspended his bond, and found a cautioner in the suspension. Stair, 23d February 1671, Arnold *contra* Gordon. — But a bond of corroboration, with a new cautioner, being granted by the principal and cautioner in the original bond, the cautioner in the bond of corroboration was found to have a total relief off the cautioner in the original bond. Fountainhall, Dalrymple, 1st December 1703, Clarkson *contra* Edgar. Dalrymple, 14th February 1705, Brock *contra* Lord Bargeny. — In like manner a bond being suspended by the principal and cautioner, the cautioner in the suspension was found entitled to a total relief. Fountainhall, 27th February 1685, Fleming *contra* Wallace. — Upon the same principles, in a case where one of the cautioners granted a bond of corroboration with a new cautioner; it was found, That the new cautioner, paying the debt, is entitled to demand from the cocautioner in the original bond such relief only as would be competent to the cautioner for whom he interposed; because, tho' a cautioner, interposing in a corroboration, may recur *in solidum* against all those for whose behoof he interposed his credit; yet, with regard to others, he comes only in place of those persons for whom he interposed. Dalrymple, 3d December 1717, Godfrey *contra* Quesnoy.

By a clause of relief in a bond, my Lord Annandale, Lamerton, and four more bound therein as coprincipals to Craighall, being obliged to relieve each other for their own part, without the taxative word, *allenary*; and Lamerton having, upon distress, paid the debt, pursued my Lord Annandale to relieve him of the half; alledged for the defender, that he could be liable only for a sixth part, they being obliged to relieve *pro rata*; the Lords, in respect of the notour insolvency of the other four coprincipals, decerned the defender to pay the half of the whole debt. Marcus, (Cautioner) February 1683, Lamerton

If any of the
correi prove insolvent?

merton *contra* Earl of Annandale. ----- The like found where the pursuer, upon payment, had taken an assignation to the debt. Harcus, (*Cautioner*) 2d February 1682, Muir of Glanderston *contra* Chalmers of Gadgirth. Forbes, 26th December 1707, Cleghorns *contra* Yorkston. ---- One of three cautioners becoming insolvent, and another having paid the debt upon discharge and assignation, and for two thirds thereof adjudged the other solvent cautioner's estate; the Lords restricted the adjudication to the half, and took off accumulations. Forbes, 26th July 1705, Lillie *contra* Crawford.

Relief competent to a cautioner against the principal debtors.

Two principals and several cautioners being bound conjunctly and severally, and the principals in the same bond being bound for relief of the cautioners, not conjunctly and severally, but simply obliged to relieve the cautioners; the Lords found, That the principals were thereby obliged conjunctly and severally, seeing the clause behaved to be ruled by the tenor and course of the rest of the obligation. Durie, Hope, 13th, (*De fide jussoribus*) Haddington, 14th November 1622, Forbeses *contra* Ld. Muckall. ---- Three principals and a cautioner having granted bond for a sum conjunctly and severally; and the principals therein obliging themselves to relieve one another *pro rata*, and to relieve the cautioner in general, without mentioning *pro rata* or conjunctly and severally; the Lords found these coprincipals liable *in solidum* to relieve the cautioner, who paid the debt upon distress, and took assignation from the creditor for his relief. Forbes, 19th June 1713, Buchannan *contra* French.

Socii liable *in solidum*, or *pro rata*.

THREE drovers having writ to a Highland Gentleman, that they had commissioned such a person to buy cows for their use, obliging themselves to pay such bills as should be drawn upon them for the price of the cattle, and the said commissioner having drawn a bill upon them accordingly; the Lords found, that in respect they were partners and *socii*, as to the bargain, they ought to be liable *in solidum*. Newbyth, 18th, Dirleton, 19th December 1665, M'Leod *contra* Young. ---- Found, That the buying of bear by the clerk of a brewery, which came to be brewed there, made the masters of the brewery, who were *socii* liable *in solidum* for the price of the bear. Harcus. (*Society*) March 1683, Johnston *contra* Sir William Binning and Baillie Neilson. -- The factor of two copartners having entred into contract, and bound his constituents conform to his powers, in which there was a clause of mutual relief; the Lords found them nevertheless *ex natura societatis* liable to the third party contracter *in solidum*, and not only *pro virili parte*. Fountainhall, 26th January 1698, Brand *contra* Warden and Buchannan.

Have they action *in solidum*?

ONE partner in a society delivering goods to their factor, has a good title to demand redelivery, and the factor is not allowed to retain upon pretence of the interest of the other partners, unless, having sold the goods, he has paid these partners their shares. Stair, 9th January 1672, Monteith *contra* Anderson.

Owners of a ship, how liable?

MERCHANTS receiving damage by the skipper's fault, the Lords found each owner liable, only for the value of his share of the ship, and not *in solidum*. Gosford, 20th July 1669, Learmonth *contra* Guthry

rie. — Thereafter each owner was found liable *in solidum* for the damage done by the skipper's fault, without regard, whether each man's interest in the ship did extend so far ; but, as the damage claimed was within the value of the ship itself, there was no occasion to determine, whether the owners could be reached beyond the value of the ship. Stair, 11th, Gosford, 12th December 1672, Carnegie *contra* Napier. — The like. Stair, 10th June 1680, the Anna of Christiana *contra* Captain Morton. — An owner found liable *in solidum* to the value of his interest in the ship, for furnishing bestowed upon the ship by the commission of another party now bankrupt ; here no more was claimed than that he should be found liable to the value of his interest. 2d December 1725, M'Givan *contra* Blackburn.

Two or more accepters of a bill of exchange, are liable each *in solidum*, unless the contrary be specified. Gosford, 19th, Stair, Dirleton, 29th, January 1675, M'Moreland *contra* Maxwell. Fountainhall, 18th February 1707, Rutherford *contra* Donaldson.

THE Lords found, That a bill of exchange being payable to two, they were *correi credendi*, so that payment made to any one of them, did liberate the debtor for the whole, reserving action to the other party, as accords, to call him who received the money to accompt for his proportion of it. Fountainhall, 17th January 1685, Robertson *contra* Forbes.

AN heir-portioner cannot be conveyed by a creditor of the defunct, but *pro rata*, altho' she had more by her father than the debt pursued for. Spotiswood, (*Heir*) Durie, 7th February 1632, Home *contra* Home. — Heirs-portioners being pursued for the father's debt, and one of them renouncing ; the Lords found, That the other could only be pursued for the half, and that for the other half the creditor might lead an adjudication *contra hæreditatem jacentem*. Auchinleck, (*Heirs*) 16th November 1633, *contra* . Marcus, (*Airs*) December 1685, Oswald *contra* Sommervell. — A creditor marrying one of the three heirs-portioners of the principal debtor, and then charging the cautioner for the debt ; the Lords found the charger no further bound to relieve the cautioner suspender, but for his own third part, notwithstanding, that if they had been executors, they might have been conveyed *in solidum* each of them, if their intromissions had exceeded the debt acclaimed. Spotiswood, (*Heir*) 3d July 1635, Duncan *contra* Ogilvie. — One of two heirs portioners was found liable *in solidum* for a debt of their father's, without necessity of calling the other, who was poor and *non solvendo*, and had assigned her share to the sister pursued. Durie, 24th January 1642, Scot *contra* Hart. — An heir-portioner is liable *primo loco*, only for her own share till the rest of the heirs-portioners be discussed ; but the Lords determined not, whether these who were *solvendo* should be liable *in solidum*, altho' the debt exceeded their proportion, or only *in valorem*. Stair, Dirleton, 23d December 1665, Burnet *contra* Leper. — The Lords suspended a decret in absence, against three heirs-portioners, who were all called ; because they were decerned *in solidum*, and not *pro rata*, which was *pars judicis*. Marcus, (*Airs*) July 1687, Jordanhill *contra* Edmonston. — The Lords reduced a sheriff's decret, decerning a Lady to pay a sum contained

tained in her father's bond, on this head of injustice, That she was but one of two sisters heirs-portioners, and yet was decerned for the whole, and this, altho' she had the whole estate, the one half as heir of line, and the other by disposition from her father, her sister having only a bond of provision in satisfaction of all she could crave; yet it was found, That the sister ought also to be called and discussed, in case there was any thing whereto she might succeed as heir of line. Fountainhall, 25th June 1680, Brown *contra* Lady Ballegerno.---The Lords found heirs-portioners not liable *in solidum*, but if the rest prove insolvent and be discussed, and no other estate be condescended on, that then the shares of such as are insolvent do fall upon the rest, but so as to extend no further than to their proportion and benefit of the succession; even as an executor is only liable *in valorem inventarii*, and one may be decerned so far as his share reaches. Fountainhall, 21st June 1698, White *contra* Hay.

Executors
liable *in soli-*
dum, or only
pro rata.

EXECUTORS are not liable *in solidum* to pay legacies, but *pro virili*, unless one has intromitted with as much. Durie, Hope, (*Executor*) 13th January 1625, M'Mitchels *contra* M'Quharg. Durie, 12th July 1626, Turnbull *contra* Matthewson.--- One of two executors cannot be pursued *in solidum* for a debt of the defunct, unless it be alledged that he intromitted, or might have intromitted with as much as will satisfy the pursuer. Auchinleck (*Executor*) Durie, 22d July 1630, Salmon *contra* Executors of Ore.--- In an action against a surviving executor, the Lords admitted this exception for the one half, *viz.* That the deceased executor had intromitted with the one half, and so the other could not be pursued for the whole. Hope, (*Executor*) 20th February 1617, Halliday *contra* Halliday. Durie, 18th July 1628, Peacock *contra* Peacocks.

In a process
must they all
concur, or have
they action *pro*
rata?

WHERE one of more executors is appointed to be intrometter, the Lords found, That he may pursue as such, without concurrence of the rest. Maitland, 16th July 1565, *contra* Hamilton. --- Found, That, as one of more executors cannot be pursued without the rest be called, so neither can he pursue; no, not for that part of a debt which he would get by his office, *e. g.* one of three cannot pursue for a third part. Maitland, 1st February 1566, Borthwick *contra* Douglas. --- Found, That one of more executors cannot transact nor grant discharge without his colleagues. Colvil, 9th December 1575, Marjoribanks *contra* Ld. Balfour. --- As an executor may be convened alone (where there are two or more) by the creditors for the whole debts, if he have intromitted with as much as will pay them; so may payment be made to one of the whole debt, where the other executor has intromitted with the like value more than his own part; and this was found, tho' proponed by the debtor, and not by any other of the executors, and the said executor his discharge was found sufficient to liberate the debtor at the hands of the rest. Durie, 24th March 1630, Semple *contra* Dobie. --- Four executors being conjunctly nominated, and a licence to pursue being granted to all the four without confirmation; the Lords found, That one of them could not alone pursue a debtor, except all the rest did either concur, or were excluded from the office for refusing to insist. Durie, 8th March 1634, *contra* Ld. Lagg. --- Four creditors of a defunct having been conjoined

ed in the office of executry, and the debtor of one of the bonds confirmed, having made partial payments to one of the executors confirmed, but within the fourth part of the bond, the same was objected to, as being more than the creditor's claim extended to. The debtor pleaded, That, without regard to the extent of their respective debts, executors-creditors conjoin'd in the office have an equal interest in the administration, and debtors are in safety to pay an equal proportion to each of them. It was the unanimous opinion of the court, That co-executors must all concur in pursuing or discharging, because they have but one office, are one body, and represent the defunct as one person, and therefore any one making payment to a coexecutor, without concurrence of the rest, does it at his peril. It is true the danger is not great, where the coexecutors are nearest of kin, who have an equal interest, in case the payment does not exceed the coexecutors share; but the case of coexecutors-creditors is different, a voluntary payment in that case to one will be sustained or not, according as the person receiving payment shall, in the event, be found a lawful creditor; and therefore it was agreed, That in this case the payment was not lawfully made. 7th November 1738, Inglis of Murdison *contra* Mirrie.

IN an action of compt and reckoning betwixt a minor and the heir of one of his tutors, the pursuer having three tutors, this defender was only found liable for a third of the goods belonging to the pursuer, unless the pursuer would expressly prove his particular intromission with the goods acclaimed. Haddington, 8th January 1612, Edgar *contra* Jackson. — A minor may pursue every one of his tutors *pro rata portionibus*, and needs not prove the particular intromission, because they were bound to intromet and do diligence; but one of the tutors will have action against the others for their intromissions, because ilk one of them should answer to his colleagues for his particular intromission. Haddington, 22d February 1612, Hunter *contra* Wilson. — A discharge granted by three or more tutors jointly, makes each of them liable *in solidum* to accompt for the money. Durie, 22d February 1634, Davidson *contra* Jack. — The like, with regard to curators. Durie, 11th February 1630, Guthrie *contra* Guthrie. — All tutors accepting are liable to the pupil *in solidum* for omissions as well as commissions, reserving action to those who intromitted not, for their relief against the tutor who did intromet. Gosford, 3d June 1675, Burnet *contra* Burnet. Falconer, 9th March 1684, Lockhart *contra* Elies. Marcus, (Tutors) January 1686, Sinclair *contra* Lord Sinclair.

Tutors and
curators liable
in solidum, or
only *pro rata*?

A RENOUNCIATION of a minor being quarrelled, that it was only subscribed by two of her curators, there being four in all chosen, was nevertheless sustained. Spotiswood, (Tutor) 9th February 1628, Chalmers *contra* Cunningham. — Three tutors being nominated conjunctly, in a pursuit at the instance of one against the other two, to accept or renounce, one of them compearing and renouncing, and the other alledging, That the pupil was not sufficiently authorised in this process, the alledgeance was repelled, and process sustained. Durie, 8th March 1628, Muir and Thomson *contra* Kincaid.

Must they
act in a body?

Quorum of
tutors and cu-
rators.

A BOND having been found null, as granted by a minor having curators without their consent, this objection was also repelled, That the act of curatory was null, eight being chosen, one of whom had neither made faith nor found caution; notwithstanding whereof the Lords found the act of curatory complete. Hope, (*Minor*) 11th March 1612, *Ld. Airth contra*. ---- Three tutors being equally nominated by the testator, one dying, and another refusing to accept, the Lords found, That the whole office was thereby devolved on the third who had accepted. Haddington, 12th December 1609, *Fawside contra Adamson*. ---- Five tutors being nominated without mentioning *conjunctly and severally*, the nomination was found effectual, tho' two only accepted, and they found liable for omission and intromission, Stair, 14th, Gosford, 15th February 1672, *Elies contra Scot*.

A TUTORIAL testamentar expires not by the death of one, altho' the tutors were named conjunctly. Hope, (*Executors*) 23d January 1621, *Stewart contra Kirkwood*. ---- A tutorial testamentar being to two jointly, the death of one of them evacuates the office. Stair, Gosford, 17th January 1671, *Drummond contra Feuars of Bothkennel*.

TUTORS being nominated with a *quorum*, and all refusing to accept save one; yet the Lords found, with regard to a nomination of tutors, That neither the failing of the *quorum*, nor even of the *sine quo non*, is sufficient to fopite the nomination, so long as any one of the tutors nominate is willing to accept; for the Lords thought the defunct's inclinations were to trust any of the persons named rather than the tutors at law. Fountainhall, 22d December 1692, *Wats contra Scrimzeour*. ---- The like found, Fountainhall, 22d February 1693, *Countess of Callendar contra Earl Linlithgow*. ---- An act of curatory, bearing a nomination of curators, three of whom to be a *quorum*, it was found, There could be no curators unless three had accepted. Stair, Gosford, 25th January 1672, *Ramsay contra Maxwell*.

A DEFUNCT having made a nomination of tutors to his son, with a blank for the *quorum*, and his Lady and another friend *sine quibus non*; but that friend dying, and his Lady remarrying, and no *quorum* filled up, which made the rest scruple to act, alledging, That the nomination was fallen; and they therefore having raised process in the pupil's name against themselves, craving, That they might be decerned to act, the Lords found the tutorial null, the two *sine quibus non* having now failed. Fountainhall, 1st February 1688, *Marquis of Montrose contra his tutors*. ---- In a pursuit at the instance of tutors against a debtor of their pupil, the father having named three or four, and the relict *sine qua non*, and declared any two a *quorum*, she always being one; and she thereafter remarrying, the Lords found the tutorial null, and that the debtor could not safely pay till the children were authorised either by the nearest agnate serving tutor in law, or by some other taking a gift of tutorial dative. Fountainhall, 24th June 1703, *Aikenheads contra Durham*. ---- A man settling his effects upon his eldest son an infant, did in the same deed appoint his wife and six other persons to be his son's tutors and curators, *the major part of the forenamed persons accepting, and being in life, to be a quorum, his said spouse being always one and sine qua non, and intrusted with the person of his said son during his minority; with power to her alienarily to nominate a factor, who shall have the sole intromission*. The whole tutors save the wife refused to accept; upon which head it was found, That

That the said nomination of the tutors was void, and that there was access for the service of a tutor of law. 14th February 1735, Blair *contra* Ramsay. — A woman *vestita viro* being named tutrix *sine qua non*, of which office she is incapable while her husband is alive, the question occurred, if this behoved to suspend the whole operation of the tutory, or if the rest in the mean time could act without her. Debated but not determined, betwixt the Earl of Weemyss and the tutors of Mr. Francis Charteris, December 1733.

SOME Gentlemen of a county having subscribed a commission to a party to appear for them before the barons of exchequer, and negotiate some matters that concerned the interest of the county, and upon the mandatar's neglect, another party stepping in and negotiating the matter successfully, this *negotiorum gestor* was found entitled to be re-founded of his expences *in solidum* against the Gentlemen who subscribed the commission. February 1726, Anderson *contra* Sinclair.

— An agent employed jointly by several persons to carry on a process for their common behoof, was found to have action against each of his employers *in solidum*; for as the agent would have been liable to each *in solidum* for any mismanagement of the process *directa mandati actione*, they ought to be liable to him in the same manner *contraria actione*.

February 1730, Chalmers *contra* Ogilvie. — Several heretors in a shire having agreed with a workman to build a bridge over a certain river, for which they were to pay him L. 150 Sterling; in an action for payment of this sum against one of the covenanters, the defender was found liable *in solidum*, reserving to him to operate his relief from the other heretors. 21st November 1730, French *contra* Earl of Galloway.

A DOER for a Lady having caused antedate an execution of an edict for confirming her executrix, and she having made use thereof, the Lords found them both thereby liable to the party injured in his damages conjunctly and severally. Bruce's MS. 13th June 1716, Sutherland *contra* Wiseman. — The Lords both sustained process against the heir, who was conveyed for the terce uplifted by him, and also against the tenants who were conveyed for payment of the same duty, and that *in solidum* against both. Durie, 13th February 1628, Lady Dunfermline *contra* her son.

LITISCONTESTATION being made against a number of persons in a spuilzie, and the intromission of them all being proved, the quantity was found to divide among them, and to have execution against each *pro rata*; but one of them having deceased after litiscontestation, the rest were found liable also for his proportion. Haddington, 2d December 1609, *contra* Ld. Cowgrain. — In wrongous intromission each intrometter is not liable *in solidum*, but a joint intromission proved against many does infer against each of them an equal share, unless it be proved against any of them that they intromitted with a greater share; but there is no necessity to prove against each of them the particular quantity of their intromission. Stair, Dirleton, 17th January 1668, Strachan *contra* Morison. — Tho' spuilziers pursued within three years are liable *in solidum*, yet after three years being restricted to simple intromission, and a promiscuous intromission of many

ny being proved, they are all decerned equally *pro rata*, unless the defender or pursuer prove that such an one's intromission was less or more than others. *Harcus, (Spuilzie)* January 1687, Captain Strachan *contra* Morison. — In a question whether these accomplices who had assisted a tenant to carry his goods and corns off the ground to the prejudice of his master's hypothec, should be liable *in solidum*, or only *pro rata* for the damage, where no violence was used in the away taking; the Lords considering the intromission to be unwarrantable; and that, tho' they were not sharers in the benefit, yet that it was a delinquency *in suo genere mali exempli*, and, if allowed, would encourage tenants to help their neighbours in defrauding their masters, by clandestinely conveying their goods and corns off the ground; therefore in this circumstantiated case, their Lordships found all the assistants liable *in solidum*. Fountainhall, 18th November 1704, Lord Salton *contra* Club.

Magistrates
who suffer a
prisoner to
escape.

FOUND, That a prisoner having escaped out of ward, one of the bailies could not be conveyed for damages, except the whole bailies and council were called; but found that part of the libel relevant, which bore that he was set at liberty by command of the said bailie, who therefore ought to be conveyed *ob propriam culpam*. Hope, (*De actionibus in factum*) 12th January 1615, Gray *contra* Malice. Haddington, 7th December 1609, Craig *contra* Shearer. — The like. Durie, *penult.* January 1627, Ker *contra* Bailies of Jedburgh. — Altho' a prisoner escape by one magistrate's fault only, yet all are liable, reserving to them their relief against him, or against the town, if he be insolvent. Durie, 11th, Auchinleck, (*Caution*) 14th November 1634, Brown *contra* Town of Inverness. — One of the magistrates of a town, who himself, upon the creditor's charging, had imprisoned a rebel, being dead after the rebel's escape out of prison, the Lords sustained action against the other magistrates surviving, conjunctly and severally, and that without any necessity of pursuing the representatives of the deceased. Durie, 24th January 1642, Smith *contra* Williamson.

Upon a de-
creet against
severals, if
each may be
charged *in so-
lidum*?

HEIR and executor sued and held as confessed, and decerned to pay the debt, without adding in the summons or decret, severally or *in solidum*, were found liable each for the half only, tho' they were liable to have been sued and decerned for the whole. Durie, 28th February 1626, *contra* Douglas. — Altho' where two executors are decerned to pay to a creditor, he may seek execution against any one *in solidum*, if his intromission amount to as much as will pay the debt; yet this was not sustained against one of two intrometters; for the Lords found, That the sum ought to divide, tho', if the pursuer had insisted, the decret would have been given against them *in solidum*. Durie, 16th November 1626, Chalmers *contra* Marshall. — Found, That tutors were liable to their pupil conjunctly and severally, altho' the decret was pronounced against them only conjunctly, and not against them and every one of them. Spotiswood, (*Tutor*) Auchinleck, (*Tutor*) Durie, 9th December 1628, Sutor *contra* Watson. — The Captain and owners of a privateer being decerned, but not conjunctly and severally, to restore a ship and loading that they had seized *sine culpa*, upon sufficient ground of suspicion, one being charged for the whole price, suspended;

pended; the Lords found him liable *in solidum*, for the decret be-
hoved to be understood *secundum naturam negotii*; and here the de-
fenders were naturally liable *in solidum*, both as *exercitores*, and as be-
ing liable in a *factum indivisibile*. Stair, Dirleton, 9th February 1675,
Praris *contra* Martin. — A decret, ordaining two persons to pay a
certain sum libelled, was sustained to bind them conjunctly and sever-
ally, altho' the decerniture did not express it, because the libel in the
preamble bore, That they were bound conjunctly and severally, which
the Lords found ought to regulate the decerniture. Auchinleck, (*De-
cree*) 2d February 1630, Ker *contra* Lempitlaw.

Two executors confirmed having obtained decret against a debtor, <sup>Two credi-
tors conjoined
in a decret, if
they can
charge in *solidum*, or only
pro rata?</sup> decerning him to pay to them, but not conjunctly and severally, each
of them can only discharge his own half, so that one of their discharges,
upon payment of the whole, was only sustained for his own half.
Durie, Auchinleck, Spotiswood, (*Executor*) 17th March 1630, Semple
contra M'Neish.

FOUND, That when divers persons are constituted sheriffs in that <sup>Quorum of
judges.</sup> part by the Lords, no sentence can be pronounced by them unless
they be all present. Balfour, (*Judge*) 10th July 1558, Henrison
contra Fiddes.

A MATTER submitted to a certain number of men, was esteemed ^{Of arbiters,}
to be referred to them conjunctly, unless it were otherwise expressly
provided. Haddington, 5th June 1605, Sutherland *contra* Torie. —
A decret-arbitral was found null, for this reason, That it was referred
to four arbiters, (each party having named two) who, in case of discre-
pancy, were to choose an oversman, and yet the decret was given on-
ly by two, who took on them to nominate an oversman, the other
two dissenting, altho' one of these two was the pursuer's own arbiter.
Fountainhall, 18th November 1696, Watson *contra* Miln.

FOUR auditors being nominated, two by each party, and authorised ^{Of auditors,}
by the Lords to audite compts, and report, the commission not bearing
to them conjunctly, and three only subscribing the report, this was
found sufficient. Durie, 10th January 1624, M'Math *contra* Poure.

A LEGACY left to children, to be employed for their behoof, at ^{Of trustees,}
the sight of several persons, and it being accordingly employed by the
advice and consent of them all save one, the Lords, in a process at the
instance of the legatars against the executor, found, That it was not
employed as it should have been for want of that one's consent (he be-
ing absent at the employing) and therefore decerned in favours of the
children. Spotiswood, (*Legacy*) 13th February 1624, Hunter *contra*
Executors of M'Michal. — A man having left 2500 merks to
his children, with a power to four friends, named in the deed, to
divide the same, as they should see cause, among the children;
the Lords found, That one of the four friends being dead, the divi-
sion made by the three surviving could not subsist, but that each must
draw an equal share, as if the nomination had not been made; and
when it was urged, That in a tutory the death of one does not e-
vacuate the nomination; it was answered, There is a difference be-

twixt a trust of a current administration, which implies a tract of time, and a trust to do one single act; in which last, as time is not implied, there is no presumption the granter had the death of any of the nominees in view, or intended that, by the death of one, his trust should accrete to the survivors, unless where the deed bears a power to any of the persons named or establishes a *quorum*. Fountainhall, 10th February 1693, Moir *contra* Grier. — There being a submission to three friends, that when they found the father was in need, the son should pay him such a yearly sum; the Lords *in re tam favorabili* sustained a declaration emitted by two of the friends, without the third, to constitute the aliment. Fountainhall, 27th July 1694, Riddel *contra* Riddel.

Of managers.

THE mortification of an hospital, carrying a power to three persons named, or any two of them, to administer and manage, and now two of the three being dead; the Lords found the administration of the hospital to be like a tutory, and that it accreted to the survivor by the death of the other two administrators, notwithstanding the said words of the mortification, and found, That after the third should also de- cease, the nomination belonged to the heirs of the mortifier; but be- cause, in the present case, the mortifier was a bastard, and so had no heirs, that here it belonged to the King as *ultimus hæres*. Fountain- hall, 15th July 1680, the Hospital of Largo *contra* the Earl of Weemys.

Of commis- sioners,

A COMMISSION being granted by the Lords to two persons, jointly, to take a party's oath, the commission was sustained, the oath being clear, and nothing being objected that could have been further interro- gated, tho' it was taken but by the one commissioner, the other being absent. Stair, 13th January 1672, Strachan *contra* Ld. Tolquhoun.

SPUILZIE.

What under- stood to be a spuilzie.

THE Lords refused to sustain action of spuilzie where the goods were libelled to have been in the defender's own house, and consequently dispossession not alledged, altho' they belonged to the pur- suer, but found, That the pursuer could only insist for restitution and de- livery of the goods. Durie, 8th July 1628, Alison *contra* Trail. — A liferenter in possession cannot be pursued in an action of spuilzie for cutting of wood, but only for wrongous intromission, & *ad verum in- teresse actoris*. Colvil, April 1581, Drummond *contra* Forrest. — A party finding another winnowing corn upon his ground, and having thereupon thrown the corn out of the sacks amongst the sand, but ta- king nothing away; the Lords found this a wrong, but no spuilzie. Sinclair, 24th March 1541, Miller *contra* Ld. Cullarny. — Eating up growing corn upon ground that had been common, but peace- ably possessed by another as his property only for two years, was found relevant to infer a spuilzie. Maitland, 1567, Ld. Cultmalindie *contra* Lord Oliphant. — It was found a spuilzie in a magistrate to lock up a shop, by an application of the shopkeeper's creditors, with- out

out calling the party principally concerned. 25th February 1730, Allardice *contra* Maxwell.

FOUND, That it was a relevant exception against a spuilzie, that the defender was in possession, and the pursuer having *brevi manu* entered thereto, the said defender expelled him *incontinenter*. Sinclair, 22d March 1541, Halyburton *contra* Rutherford. ---- But the contrary was found when it was *ex intervallo*. Sinclair, March 1541, Douglas *contra* Boig.

FOUND it sufficient in a spuilzie to prove possession in general, altho' the manner and quality of the possession be not libelled. Balfour, (Libel) Sinclair, 6th March 1543, Dundas *contra* Hog. ---- In actions of spuilzie and ejection, the Lords found, That possession and violent ejection ought to be libelled, and that it is not requisite to libel any title; but if the pursuer does libel a title with his possession, it was found not necessary to prove the same, but barely to shew it, *quia tenetur eo casu ostendere, sed non probare*. Balfour, (Libel) 22d March 1548, Montgomery *contra* Hamilton. ---- The like. Sinclair, 24th November 1541, Ogilvie *contra* Ld. Restalrig. Colvil, March 1581, Ld. Godycard *contra* Young. --- An executor may pursue a spuilzie of the defunct's goods, altho' spuilzied before confirmation of the testament, and therefore before the executor obtained possession. Nicolson, (Spuilzie) 14th July 1619, Douglas *contra* M'Cubin. ----- Action of spuilzie of corns was sustained at the instance of the relict of a tenant, who died after the corns were separated, against the master, and that without necessity of confirmation, altho' it was alledged, That the corns would belong to the executors, who would be answerable to the defender for the farms; but this was so decided in respect of the relict's possession, libelled continually to the time of the spuilzie. Durie, 26th July 1626, Russel *contra* Ld. Kerse. --- A man being in possession of any part of teinds by virtue of a title that he has to the whole; the Lords found, That he may pursue a spuilzie of the whole, because, in this case, possession of a part infers the possession of the whole. Balfour, (Spuilzie) 21st January 1549, Ld. Merchiston *contra* Napier. --- In a spuilzie of tiends this alledgeance was not respected, That the brocard holds only where there is *spolium ejusdem corporis*, which was before possessed by him who seeks restitution, which was not the case here, where the pursuer's possession of other crops cannot infer that she was possessor of this crop libelled, whereof she never had possession. Durie, 7th July 1629, Lady Renton *contra* her Son.

ALTHO' a master may pursue a spuilzie, in his own name, of goods taken wrongously from his tenant, where the tenant only possesses in the master's name; yet, if the goods spuilzied were given by the master to his tenant in steilbow, whereby they entirely become the tenant's property; the Lords found, That the action of spuilzie is competent to the tenant allenary. Sinclair, Balfour, (Spuilzie) 19th February 1549, Ld. Durie *contra* Duddingston.

THE Lords found, That a just title acquired after the spuilzie, does not liberate the defender *retro* from the date of his title. Sinclair, 10th February 1541, Sommervell *contra* Hamilton. --- In an action of spuilzie, the Lords refused to admit a third party, offering to compear

What title
requisite to
found an action
of spuilzie.

To whom
the action is
competent?

Spoliatus ante omnia restituendus.

for his interest, and to dispute both possession and property, *quia spoliatus ante omnia restituendus est*. Sinclair, Balfour, (*Spuilzie*) 12th February 1541, Town of Kelso *contra* Town of Selkirk. --- The brocard, *spoliatus ante omnia restituendus est*, does not hinder the defender to insist in a reduction of the decreet of *spuilzie*, altho' he has not obtempered the same, and that the brocard only takes place *quando agitur de proprietate rei spoliatae, vel de alia re, agendo principaliter, at non quando agitur per viam reductionis ad retractandam sententiam super spolio contra aliquem latam*. Balfour, (*Spuilzie*) 9th March 1541, Halyburton *contra* Rutherford. --- In a *spuilzie* of teinds, found, That altho' the pursuer's title had not been good, but that the defender's had been better; yet she had good ground to pursue this action, *quia spoliatus ante omnia restituendus est*. Durie, 7th July 1629, Lady Renton *contra* her Son. --- *Spoliatus ante omnia restituendus est*. Stair, 5th January 1669, Yeoman *contra* Oliphant.

Exception
against the ac-
tion. *Imo*,
offering back
the goods *de*
recenti.

FOUND, That it was not sufficient to offer back a *spuilzied* horse after the defender was summoned, except he had been in as good case as at the time of spoliation, and that the offer had been within 48 hours. Colvil, Allan *contra* Forrester. --- A man may be pursued for *spuilzie* of all the goods away taken, tho' he offered back a part thereof. Balfour, (*Spuilzie*) 24th March 1541, Millar *contra* Ld. Cullairny. --- Restitution of *spuilzied* goods, tho' made after the elapse of 21 days, was found sufficient to elide an action of *spuilzie*. Balfour, (*Spuilzie*) 16th July 1532, Rollock *contra* Stirling. --- An exception of an offer of the horse, within four or five days after the spoliation, with the expences, found not sufficient to elide the *spuilzie*, specially the brother of the defender taking away the horse, and detaining him at his pleasure immediately after the offer. Haddington, 12th January 1610, *contra* Forrester. --- Restitution, tho' within an hour after committing the *spuilzie*, was found not relevant, unless it had been made *cum omni causa*; and therefore restitution of goods, after deterioration, was found no restitution. Nicolson, (*Spuilzie*) 23d February 1611, Knows *contra* Learmonth. --- Unless the deterioration had happened *casu fortuito*, which would have fallen out altho' the goods had not been poinded. Nicolson, (*Spuilzie*) 3d March 1624, Leslies *contra* Inglis. --- The Lords found an exception of restitution of *spuilzied* goods within 48 hours, and the pursuer's receiving them back, relevant to elide the action of *spuilzie*. Nicolson, (*Spuilzie*) 24th March 1624, Syme *contra* Ambrose. --- A messenger having poinded goods wrongously, it was found no defence, That the proprietor did re-apprehend the same, seeing his possession was but momentaneous, the creditor, at whose instance the poinding was, having taken the same back again in virtue of the poinding. Durie, 9th November 1630, Brown *contra* Lamb. --- This exception in an action of *spuilzie* was repelled, *viz.* That the pursuer, six days after the away taking of the goods, took them violently back again. Colvil, 21st April 1575, Dunbar *contra* Crawford.

2do, Colour-
able title of in-
tromission.

A PERSON being the King's donatar, and intronetting with escheat goods *brevi manu* without declarator, this was found sufficient to liberate him *a spolio*. Sinclair, *contra* . --- In case of *spuilzie* of real evidents, such as infeftments, &c. the Lords found, That

That the libel being proved, the pursuer ought to have his oath *in li-tem*, as in other cases, altho' the defender had this colour, That he intromitted by virtue of a gift of the pursuer's escheat. Colvil, July 1583, Ld. Balmanno *contra* Ld. Balvaird. — The like. Colvil, 4th December 1576, Ld. Kelwood *contra* Earl of Cassils. — A donatar intrometting with goods in the custody of the rebel's relict, before it was proved in judgment that they belonged to the defunct the time of his decease, was found liable in spuilzie. Colvil, *ult.* November 1575, Muirhead *contra* Lowson. — The Lords decerned a man in a spuilzie of a deceased bastard goods, who was rehabilitated by the King, altho' he had a *titulus coloratus*, viz. a gift of bastardy from his Majesty, with a letter from him to the sheriff to possess him. Sinclair, 12th February 1543, Bastard's executors *contra* Douglas. — After decret for a debt, obtained, and the debt thereupon paid, the creditor taking out a precept of arrestment and poinding; and having accordingly poinded, was found liable in a spuilzie, notwithstanding of the *coloratus titulus* of the precept of a judge. Sinclair, 26th February 1543, Wauchop *contra* Borthwick. — An alledgeance of lawful poinding by the relict for her debt, (she having right to the third, which far exceeded the value of the goods poinded) did not elide the spuilzie pursued against her by the executor. Nicolson, (*Spuilzie*) 14th July 1619, Douglas *contra* M'Cubin. — A party having taken a horse coming home with meal from another mill than his own, to which the owner of the horse was thirled, and in an action of spuilzie defending himself with the book of Majesty, and the custom of that country, viz. Athole; the Lords sustained the exception to liberate from spuilzie, but not from restitution of the horse. Durie, 14th March 1635, M'Kay *contra* Menzies. — One being pursued for the spuilzie of a horse and a load of corn, alledged, That the horse (which belonged to the miller of a mill without the barony) was lawfully seised and detained as escheat, conform to the statute King William *cap.* 9. for carrying the defender's tenants corn out of his barony to another mill; answered, The statute is now gone in desuetude. The Lords found the defender liable for restitution of the horse *in statu quo*, but refused to find him guilty of any spuilzie, in respect of the colourable pretext he had for seising and detaining the horse upon the said statute. Marcus, (*Spuilzie*) November, Falconer, 1st December 1683, Thin *contra* Scot of Langshaw. — The Lords refused to sustain this defence in a spuilzie, viz. That there was an immemorial custom of poinding *brevi manu*, for the nonperformance of services to the possessors of a neighbouring tenement, by labouring their grounds, and shearing their corns, whose infestments bore services used and wont. Forbes's MS. 19th February 1714, Brodie *contra* Watson. — The messenger being conveyed in a spuilzie as one of the spuilziers; the Lords found the alledgeance proponed for him relevant, to liberate him both from the spuilzie, and wrongous intromission, viz. That he poinded by virtue of the Lords letters, directed for poinding the pursuer's goods for the debts therein contained, altho' the decret, whereupon poinding was raised, was not given against the pursuer, for it was not his fault that the letters were wrong directed; and as he had no opportunity to see the decret, so it was not his part to call for it, or search the same. Durie, 4th March 1628, Scot *contra* Banks. — A general disposition for relief of cautionry, which is not a title, *brevi manu* to apprehend

possession of the goods remaining with the disponer, tho' it may be the foundation of an action; was found sufficient *ad vitandum spoliū*, unless the disponent had intromitted by violence, being resisted by force. Stair, 30th January 1662, Irvine *contra* M'Artney. — Tho' an inhibition of teinds, without a sentence following thereon, is no sufficient title for drawing the teinds *ipsa corpora*, yet it was found a colourable title to bar a spuilzie; and therefore the process was only sustained for wrongous intromission. Stair, 27th January 1665, Ld. Bearford *contra* Lord Kingston. — A person upon a decret of a Highland circuit, having immediately poinded, tho' the decret carried a warrant first to charge, but without naming on what number of days; in a process of spuilzie raised on this account, the Lords found, That tho' the decret was iniquous, yet it was warrant enough to assoilzie from a spuilzie; but declared it to be wrongous intromission in order to restitution. Fountainhall, 19th February 1702, Sinclair *contra* Dunbar. — In a bond of relief, granted to a cautioner, there was a clause obliging the principal debtor to relieve his cautioner, and for that effect to pay the money, not to the cautioner, but to the creditor, betwixt and a certain term; after elapsing of the term, the cautioner registered his bond of relief, and obtained a precept of poinding from the bailies of Edinburgh, which he put in execution; upon this poinding unwarrantable, in respect the obligation to pay was conceived in favours of the creditor, not of the cautioner, the common debtor intended an action of spuilzie, and the question was, whether the precept of poinding was not a colourable title to defend from the penal consequences of the action. This debated but not finally determined. February 1732, Shaw *contra* Gray.

3tio, Command or authority of a superior.

No day was allowed a defender in a spuilzie to call his warrant, because wrong has none. Sinclair, 25th June 1543, Tennant *contra* Crichton. — But a defender was allowed to call his warrant in a spuilzie of teinds, where he had a tack and was in possession. Sinclair, 13th March 1541, Greenwallis *contra* Lawson. — Found, That neither the King's private letter, nor even a commission from the privy council can warrant a spuilzie. Colvil, April 1586, Lady Mar *contra* Earl Glencairn. — A man being pursued for spuilzie of teinds, because, he being a youth in his father's house, had led his father's corns unteinded into the barn-yard, his excuse *super necessitate parendi* was not admitted, but the Lords declared, that they would give the better attendance to the probation, and reserve the modification to themselves. Haddington, 10th December 1608, Glen *contra* Seton.

VIOLENT profits in a spuilzie. See Violent profits.

SPUILZIE after three years restricted to wrongous intromission. See Prescription.

ST E I L B O W.

Whether the property of the master or tenant?

THE Lords, in an action of spuilzie of cattle, were of opinion, altho' it past not into an interlocutor, That steilbow goods being delivered by the master to his tenant at setting the room, might be poinded

pounded for the tenant's debt; and that the master would have only action against the tenant for the steilbow at the time appointed for redelivery thereof, in respect that the said goods became really the tenant's own, seeing every year they were changed, and the first of them that were delivered by the master to the tenant, could not probably be extent, in respect of the alteration by the course of years, which alteration made them absolutely the tenant's own, and therefore subject to his debt. Durie, 24th November 1624, Turnbull *contra* Ker. — Yet goods set in steilbow to a tenant fall not under his escheat, but under the master's. Haddington, 4th November 1609, Boyd *contra* Russel. — And goods given in steilbow to a tenant, to be returned by him at the ish of his tack, were found to fall under the heretor's escheat, and to pertain to the donatar, and not to the heirs or executors of the rebel, tho' he deceased before the ish of the tack. Auchinleck, (*Escheat*) Durie, 6th December 1628, Lawson *contra* Lady Boghall. — But where a tenant had no tack, the Lords ordained him in such a process to deliver the steilbow goods to the donatar betwixt and Whitsunday next after the pursuit. And this, notwithstanding it was alledged, That as the heretor could not remove him without a lawful previous warning, so no more could the donatar who was come in his place, especially the goods being the means whereby he laboured, and were *pars fundi*, for they found, That it was in the tenant's option, either to leave the room after Whitsunday, or to remain in the same till he were warned by one having right to the land, which a naked donatar to the single escheat could not do. Durie, 18th July 1637, Viscount Belhaven *contra* Lady Lufs.

THE Lords found that steilbow goods belong to a man's executors, and not to the heir, altho' it was alledged, That they were *pars fundi*, *& cedunt cum fundo fundi proprietario, as instrumenta fundi*; and this was found in consequence of the two above decisions, whereby they are found to belong to the donatar of the single escheat. Durie, 4th December 1638, Lady Westmorland *contra* Lady Home. Durie, 28th January 1642, Dundas *contra* Brown.

Whether it goes to the heir or executor?

S T I P E N D.

STIPEND is *debitum decimarum*, a burden upon the teind, and a minister may take himself to any of the heretors, in so far as he has teind, without prejudice of that heretor's relief against the other heretors. Stair, Newbyth, 3d December 1664, Hutchison *contra* Earl Caffils. Durie, 6th July 1625, Morton *contra* Scot. Spotiswood, (*Kirk-patrimony*) Durie, 21st March 1633, Keith *contra* Gray and Carmichael. — The Lords found, That where ministers pursue for a locality, before the commission for plantation of kirks, the patron may make an allocation, but that, in a process before the session, it was not receivable, but that the minister might distress any to the value of their teinds, until his stipend were settled. Fountainhall, 26th February 1696, Coupar *contra* Earl of Roxburgh. — A creditor having pounded corns standing in the stoucks, and carried a rip of them to the mercat-crofs, which was all he could do in that case, and the minister for his stipend, and some preceeding rests, pounding the same corns before they

Debitum decimarum.

were threshed, and carrying away as much as would answer to the teinds, the Lords found, That the minister had committed no spuilzie, but that he had right to retain, in so far as extended to the common debtor's proportion of a year's stipend, but not for any by-gones, and that he must restore the superplus. Fountainhall, 22d December 1698, Cathcart *contra* Paton.

Consequent-
ly every intro-
metter liable.

AN intrometter with teinds will be found liable to pay the minister his modified stipend *in solidum*, for the whole quantity of his intromission, if it extend to so much as will pay the minister's stipend, notwithstanding that the rest of the parish had intrometted also, and the suspender had no relief to get, but from the granter of his tack, who was a dyvour. Haddington, 20th June 1623, Balfour *contra* Ker. — A minister, conform to his right, pursuing the parish for their respective proportions of their teinds, and one of them suspending, upon this reason, that he had only taken the grafs of a room from the heretor for summer pasturage of some goods, and had paid the duty before the charge given by the minister; the Lords found, in this case, that altho' the heretor had right to the teinds of the lands, both great and small, yet the minister might still seek payment of that proportion laid upon the teinds of the lands from the suspender, seeing the teinds and intrometters therewith, were, by decree, subject to the minister, he proving that the suspender possessed the lands the year controverted, and that the small teinds of the goods which he pastured thereon, extended that year to as much as the sum wherewith he was charged, because he had his relief against the heretor, the payment to whom was found not to relieve himself against the minister's charge. Durie, 19th February 1629, Kirk *contra* Gilchrist. — A merchant having bought an heritor's crop *ipsa corpora*, before the teind was drawn, was found liable for the stipend as intrometter with the teind, tho' he alledged, that he made *bona fide* payment to the heretor, of the full price. Stair, 24th June 1662, Vernor *contra* Allan.

So far as he
does intromet.

AN appriiser, who only had possessed one of the rooms apprifed, leaving the other for the common debtor, who was necessitous, being pursued by the minister for the stipend out of both; the Lords, however this might militate against the appriiser, that he suffered the common debtor to uplift part of the rents, if a cocreditor were pursuing him to accompt; yet they considered, That ministers had action against none but intrometters with the teinds, therefore they sustained the defence, and found him liable only for what he possessed. Fountainhall, 7th July 1697, Malcom *contra* Irvine. *N. B.* It had been found, That a compriser of a right to teinds, tho' never entring into possession, was liable to the minister for his stipend. Haddington, 20th December 1622, Minister of Crailling *contra* Ker.

Stipend not
debitum fundi.

STIPEND is not *debitum fundi*, and the heretor is not liable as long as there is a liferenter who intromets with the whole rents. Stair, 24th June 1663, Menzies *contra* Ld. of Glentorchy.

Is the here-
tor liable for
the localled
stipend, tho'
he intromet
not?

WHETHER the heretor, upon whose land the stipend is localled, is directly liable to the minister, or only in case he intromet with the teinds, disputed. Home, June 1726, Minister of Kirkbean *contra* Ld. of Cavens.

FOUND,

FOUND, That a minister being presented by a patron, but not having obtained collation and institution, the stipend does not belong to him, but may be disposed of as a vacant stipend. ^{What gives right to the stipend?} Haddington, 7th November 1611, Thomson *contra* Viscount Haddington. ---- The Lords found, That the presentation of an actual minister before the term, gave not a complete right to the stipend, unless there had been a warrant for his transportation. Dirleton, 12th December 1676, College of Glasgow *contra* Parishioners of Jedburgh.

STIPEND at what terms due? See Term legal and conventional.

Substitute and conditional Institute.

A BOND being granted to a man, and, failing of him by decease, to another, it was the old opinion, That if the first outlive the term of payment, the sum will not belong to the person named in the second place, being considered not as a proper substitute, but as a conditional institute only, and therefore that the executors of the institute will take it. Haddington, 20th July 1609, Cowlland *contra* Laing. Durie, 22d February 1623, Leitch *contra* Ld. Balamoon. — But the contrary is now established. Durie, 18th January 1625, Watt *contra* Dobie. Durie, 26th June 1634, Keith *contra* Innes. — A defunct in his testament named his daughter his executrix and universal legatrix, and, failing of her by decease, David Christy; the daughter having died, after being confirmed, and obtaining sentences for the defunct's moveables; in a competition betwixt her nearest of kin and the said David Christy, the question occurred, Whether he was a proper substitute, or only a conditional institute, having right only in case the daughter died before making up titles; the Lords found, That the settlement imported a tailzied succession and proper substitution, and preferred David Christy. Stair, 13th July 1681, Christy *contra* Christy.

AN obligation in a contract of marriage, binding the husband to employ a sum of money to himself and wife, and to the bairns of the marriage, which failing, a certain part thereof to the wife's executors, becomes void as to the executors, if a child survive the dissolution of the marriage, tho' it die soon after. Durie, 4th February 1642, Lutfit *contra* Johnston. — In the like case the Lords found, That a proper substitution was intended by the clause, so that *quandocunque heredes ex matrimonio defecerint*, there was place for the wife and her heirs. Marcus, (*Contracts of Marriage*) 4th March 1685, Gordon *contra* Ld. Drum. — A husband having become bound, in his contract of marriage, to add 2000 merks of his own to 1000 merks stipulated by the wife's father in name of tocher, and to employ the same to him and her in conjunct-fee and liferent, and to the heirs of the marriage, which failing, 1000 merks to belong to the wife and her heirs; the Lords found the wife and her heirs to be heirs of provision to the husband, and found, That the existence of an heir of the marriage, who died without children, did not exclude the substitution. Marcus, (*Contracts of Marriage*) 10th November 1687, Schaw *contra* Forbes of Skellitor. — A man, in his contract of marriage oblidging him-

self to take the securities of a sum of his own, and some lands he got with his wife *nomine dotis*, to himself and her in conjunct-fee, and to the children of the marriage, which failing, the money and land to be equally divided betwixt his and her heirs; it was found, that the substitution to the wife's heirs took place, tho' there was a child of the marriage served heir of provision, who afterwards deceased; and the clause, *quibus deficientibus* was to be understood *quandocunque defecerint*. Fountainhall, 19th January 1697, Laws *contra* Tod. ---- A man, in his contract of marriage, having provided his lands, &c. to himself and his wife in liferent, and to the children in fee, which failing, to the wife, to be disposed upon at her pleasure; a son being procreated of the marriage, who served heir, was infest, and then died, and the mother, as substitute, adjudging the same from the husband's heirs on the aforesaid clause; in a reduction at the heir's instance against her, the Lords reduced her adjudication, *quoad* the fee, she being only a conditional institute, not a proper substitute. Fountainhall, 23d February 1697, Dickson *contra* Stevenson. ---- A man being obliged to provide 400 merks to himself, and to the children to be procreated of the marriage in fee, which failing, the one half to his heirs, and the other half to hers, to be divided at the time of the dissolution of the marriage, and there being a child procreated that survived the dissolution of the marriage two years, the Lords, in respect of the speciality of the time of dividing, found the substitution did not take place in favours of the wife's heir, seeing there was a child alive at the time of the dissolution. Marcus, (*Contracts of Marriage*) 8th December 1687, Hamilton *contra* Wilson.

WILLIAM JOHNSTON of Graitney disposed his estate "in favours of William Johnston his eldest son in liferent, and for his life-rent-use allenary, and to the heirs-male to be procreated of his body in fee, which failing, to James Johnston his second son, and the heirs-male of his body in fee, reserving the disposer's liferent." Upon this disposition, containing procuratory and precept, *fasine* was taken to William Johnston the eldest son in liferent, and to the heirs-male to be procreated of his body in fee, which failing to James Johnston, the second son. There never having existed heirs-male of William Johnston's body, the question arose, Whether this was a valid infestment in James Johnston's person, or, if it was null, and he obliged yet to connect his title by a service. It was argued, That James Johnston, being no more but an heir substitute by his father's disposition, the infestment taken in his name was void and null, and he could no otherwise establish a title, either to the disposition or precept, than by a service as heir. It was allowed on the other side, That in case there had existed heirs-male of William Johnston's body, James Johnston could come in no other way than as a substitute, in which event his infestment must have vanished; but it was contended, since he was also called upon in the event that these heirs-male should never exist, in that case it could not be as a substitute, but as an institute; the Lords found the infestment null. July 1727, Competition Creditors of Johnston of Graitney.

A BOND being conceived, payable to two persons, and, failing the one by decease, to the other, it was argued, That this was not properly a substitution, but a conditional institution, and therefore such clauses make not the survivor to represent the defunct, or to be liable for his debts;

debts; the Lords found, That by this claufe the perſon ſubſtituted was heir of proviſion. Stair, 3d July 1666, Fleming *contra* Fleming. --- A ſiar, failing heirs-male, "obliged his heirs of line to reſign his lands "in favours of a brother-in-law and his heirs;" this was found not to be a ſubſtitution to make the party liable *paſſive*, but a conditional obligation. Stair, 16th January 1679, Ld. of Lamerton *contra* Lady Plendergaift.

AS to other conditional grants, See Condition.

S U C C E S S I O N.

Succeſſion in Heretage *ab inteſtato*.

AN inqueſt was found to have committed error, in ſerving a man as heir to a defunct, while there was a nearer heir in exiſtence, notwithstanding the neareſt heir had renounced all his right and claim in favours of the other; the reaſon is, That here the inqueſt did not answer that point of the brieve, *quis ſit legitimus & propinquior hæres*: And the verdict of an inqueſt is only *declaratio ſanguinis*. And as to the renunciation, it was not in itſelf a habile conveyance, nor did it proceed *a habente poteſtatem*, the granter of the renunciation not being ſerved and infeſt. Colvil, February 1588, Hay *contra* . --- A general retour will not be ſuſtained, where there is a nearer heir in life, tho' the nearer heir has renounced. Haddington, March 1612 *contra* . --- Tho' the neareſt heir renounce, it will be to no purpoſe to charge the next apparent heir, who cannot enter while there is a nearer in exiſtence. Haddington, 1ſt December 1609, Dalgleiſh *contra* Anderſon.

Tho' the neareſt heir renounce, the next heir cannot ſerve.

ONE being infeſt in lands, as heir to his mother, his ſucceſſion was found to devolve to his father, and not to his brother uterine, for in our law there is no uterine ſucceſſion, neither holds the brocard with us, *Materna maternis, paterna paternis*. Stair, 5th February 1663, Lennox *contra* Linton. --- In a competition betwixt one who had got a gift of *ultimus hæres*, and another who was ſerved heir to his grandfather's ſiſter's daughter, the Lords preferred the *ultimus hæres*, becauſe with us there is no uterine ſucceſſion. The author adds, This ought to be amended by an act of parliament, that there may be no room for an *ultimus hæres* in ſuch caſes. Fountainhall, 20th February 1696, Alexander *contra* Clerk.

No uterine ſucceſſion.

IN a competition betwixt a niece by a ſiſter-german of the defunct, and his brother conſanguinean, the niece was found to be heir of line, and the brother's ſervice reduced. Marcus, (*Airs*) January 1686, Stenhouſe *contra* Dewar. --- In a competition about a defunct's ſucceſſion, betwixt a ſiſter-german to the defunct and her brother conſanguinean, the Lords were of opinion, That the defunct having died in ap- parency, it could not be reckoned his ſucceſſion, but that the eſtate was

Whole blood excludes half blood.

still *in hæreditate jacente* of the father, and therefore they allowed the brother consanguinean's service to proceed, reserving to the other party to quarrel the same as accords. Fountainhall, 17th January 1688, Collison *contra* Moir.

Succession
in heretage
and conquest.

THE heretage of a youngest brother's son was found to belong to the descendants of the middle brother, and not to those of the eldest, because here it could not descend, tho' it was heretage, and therefore being to ascend, it was found, That it did not ascend *per saltum* to the eldest. Falconer, 15th December 1681, Johnston *contra* Watson. --- If the defunct be the youngest brother, the immediate elder is both heir of line and of conquest. Stair, 20th July 1664, Lady Clerkington *contra* Stewart. --- The youngest of three sisters dying, without heirs of her body, leaving *conquest*, her two sisters were found to succeed as heirs-portioners equally, as if the subject had been *heretage*, and it was not found to ascend only to the immediate elder sister. Home, 5th February 1717, Carle *contra* Ruffel. January 1727, Adams *contra* Thomson.

Peerage.

THE right to the dignity of a baron, where no patent appears, directing the course of succession, descends to the nearest heir of line, tho' a female. Durie, 11th July 1633, Oliphant *contra* Oliphant. --- The contrary lately found, *anno* 1729, with respect to the Lordship of Lovat, which was found to descend to heirs-male.

Succession of moveables *ab intestato*.

No representation
in moveables.

ALTHO' in moveables there is no *jus representationis*, but the surviving immediate children exclude the grandchildren by a child predeceased; yet it was found otherwise, where the defunct was expressly obliged in his son's contract of marriage, to give him a proportion of his goods at his decease; for this obligation was found to pass even to that son's children, himself predeceasing. Nicolson, (*Executor*) 4th July 1626, Halliday *contra* Hallidays.

Whole blood
excludes half
blood.

THE subject of competition was the executry of Janet Gemmil, wherein her nephews and nieces, children of her full sister, were preferred to her sister consanguinean, upon this *medium*, that they were descendants by the whole blood, whereas their competitor was only related to the defunct by the half blood; and it was argued, That amongst persons of equal degree, since the whole blood excludes the half blood, it follows, that all the descendants of the full blood do exclude the half blood, for the difference of degree never enters into the consideration, where there is a separate ground for devolving the succession; just as a great-grandchild is preferred in the succession of his predecessor to the brother or father, tho' nearer of kin to the defunct; and all this not by right of representation, which takes no place in moveables, but because the descendant line excludes the collateral and ascendant *in infinitum*, and so does the full blood the half blood. 4th July 1729, Gemmil *contra* Gemmils.

Succession

Succeſſion *a teſtato*.

If the Inſtitute repudiate the entail, the ſubſtitutes who can have no title, but by a ſervice to him, muſt of courſe be cut out, and the ſucceſſion opens to the heir of line, as if the entail had not been made. What if the inſtitute repudiate ?
Bruce's MS. 15th June 1716, Hamilton *contra* Hamilton.

No member of a tailzie can be ſerved heir while there is hope of a nearer. Gosford, 20th, Stair, 22d February 1677, Bruce *contra* Melvil. The heir in exiſtence has acceſs to ſerve, tho' there be a nearer in hope.
— A woman being ſerved heir to her predeceſſor, and dying without nearer heirs, her father was ſerved to her; but his wife having, thereafter, brought forth a ſon who was the true heir, the Lords found the father's ſervice null, and that he was not liable, upon the paſſive titles, for the predeceſſor's debts. Fountainhall, 28th December 1705, Forbes, 15th January 1706, Wat *contra* Forreſt. — One who had matched his two daughters into two ancient families, wanting to keep his own eſtate ſeparate, made a ſettlement of the ſame, " failing ſons, to " the ſecond ſon to be procreated of the eldeſt daughter; which failing, " to the ſecond ſon to be procreated of the ſecond daughter; which failing, " ing to the only ſon of the eldeſt daughter; which failing, to the only " ſon of the ſecond daughter:" When the ſucceſſion opened to the iſſue of the daughters, who were both alive, each of them had a ſon, and the queſtion upon this occurred, Whether the eldeſt daughter's only ſon could immediately take up the ſucceſſion, or if he behoved to wait ſo long as there was hope of a nearer; the Lords allowed the ſervice of the neareſt heir exiſting to proceed, in which they were unanimous, and did not proceed upon any ſpeciality, but upon the general point, that in deſtinations of ſucceſſion the neareſt heir exiſting at the time of the devolution of the ſucceſſion, is, by the preſumed will of the deſunct preferable, which they reſolved to follow as a rule in time coming; but they left the queſtion entire, if the heir ſerved was obliged to denude, in caſe of the after exiſtence of a nearer heir of tailzie. Fountainhall, Dalrymple, Forbes, 2d January 1708, M'Kenzie and her huſband *contra* Lord Mountſtewart. — Thereafter upon the exiſtence of a nearer heir, the Lords found the tailzie imported a *fidei commiſs*. and that the heir ſerved was obliged to denude in favours of the nearer heir now exiſting; but reſused to make him accountable for the *interim* rents, becauſe he was truly fiar, until the exiſtence of the nearer heir. * Fountainhall, 13th December 1709, M'Kenzie an infant *contra* Lord Mountſtewart.

A FATHER aſſigned an heretable bond of fix thouſand merks to his children, 4000 merks to Robert, and 2000 merks to William and Janet, and, in caſe of Robert's deceaſe, providing his part amongſt the reſt equally; Janet having died before Robert, and Robert having alſo died without children, William, as heir to Robert, claimed the deſunct's ſhare upon this ground, that Janet being ſubſtituted to Robert, without mention of her heirs, and having died before him, ſhe never had right, and her ſubſtitution became void, and her heirs not being called in the ſubſtitution, ſince they could not have right, but as coming in Janet's place, the ſubſtitution was alſo void as to them. On the other hand it Implied ſubſtitution.
5 H 2 was

was argued for Janet's heirs, That Janet being the last person called in the substitution, the same place that she herself would have taken up, if alive, must her heirs take up, now that she is dead; Janet was called preferably to Robert's heirs, and would have excluded them, so must her heirs, since it is not pretended, that any person is interjected betwixt them; the Lords preferred the heirs of Janet, and found, That they had right as heirs of provision to Robert, and that they ought to be served to him, and not to Janet, who never had right herself, having died before she was, or could be heir to Robert. Stair, Gosford, 5th January 1670, Innes *contra* Innes. — A woman having disposed her heretage to her granddaughter, and the heirs of her body, with a substitution to several other persons, and of the same date making a testament nominating her said grandchild to be her executrix, and universal legatrix, but not repeating therein the substitution; the Lords observing the disposition and testament to be both in favours of one person, found, That the clause of substitution must take place in both, as the presumed will of the defunct. Fountainhall, 19th July 1699, Marjoribanks *contra* Sir Francis Kinloch. — Robert Murray disposed his estate of Pulrossie, failing heirs of his body, *to, and in favours of, John and George Murrays his brother's sons, and the heirs-male to be procreated of their bodies; which failing to Sutherland of Clyne, &c.* thereafter he goes on to appoint a division of the estate betwixt the two brothers into unequal parts; George having died without heirs of his body, the question occurred betwixt his brother John and Sutherland of Clyne, which of them was substituted to him in his proportion of the lands. For Sutherland it was pleaded, That he was substituted to both the brothers in their separate rights; which was clear from the clause, *which failing*, in his favours, whereas there was no substitution in the tailzie of the one brother to the other. It was answered, The intention of this tailzie was to preserve an ancient family, "That Sutherland is substituted after the two brothers, and the heirs-male of their bodies," and no otherwise, so that he can have no claim while an heir-male of either of their bodies is alive; the plain intention of the tailzier was to prefer both his nephews, and the heirs-male of their bodies to Sutherland, which must imply a mutual substitution of the one brother and his heirs, to the other brother and his heirs; the Lords found, That Sutherland could not be served heir to George during the life of the brother John and the heirs-male of his body, and found, That John Murray may proceed in his service to his brother George. February 1734, Sutherland *contra* Murray.

*Positus in
conditione non
censetur positus
in institutione.*

A PROPRIETAR in his contract of marriage having bound himself to tailzie his estate, failing heirs-male of the marriage, to certain persons therein named; it was found, That this implied no obligation to provide the estate in favours of heirs-male, *quia positus in conditione non censetur positus in institutione.* Forbes, 2d January 1706, Dundas *contra* Dundas.

*Competiti-
on betwixt
heir and execu-
tor in bonds
containing
substitutions,
or secluding
executors.*

A SUM being provided to a man and his wife, and the longest liver of them two in liferent, and to the heirs to be procreated betwixt them two in fee; which failing to the wife's heirs or assignies; and the husband and wife having deceased without children of the marriage, the sum was found to belong to the wife's heirs, and not to her executors.

For-

Forbes's MS. 19th February 1714, Simpson *contra* Walker. — One having taken a bond for borrowed money, "to himself and wife in liferent, to the daughter in fee, and failing of her, by decease, to himself, his heirs, executors or assignies;" The question occurred after the father's decease, betwixt the heirs and executors of the father, which of them had right to the bond by the said substitution; it was yielded by the heir, That the bond was moveable *sua natura*, and that if it had been ever established in the father's person, by a service as heir of provision to his daughter, whereby the substitution would have been at an end, the bond must have descended, in the common channel of law, to the executor by confirmation; but, in the present case, as the father's representatives can take up the bond in no other shape than he could have done, that is, in virtue of the substitution only, a service is necessary to them as well as it would have been to him, and so the heir has the only title. Answered for the executors, The father being dead, his executors are heirs of provision, *designative* to the daughter the father. The Lords first found the bond heretable. Dalrymple, 14th December 1714, Children of Bailie Fife *contra* Stevenson. — Thereafter they found, That, by the death of the father, the succession did open to the father and his executors, not to his heir. Dalrymple, Bruce, 3d February 1715, *inter eosdem*. — Bond secluding executors descends by service in a perpetual channel of heirs, so that executors are excluded, not only at the first devolution, but for ever till the destination be altered. Home, 12th January 1725, M'Kay *contra* Robertson.

ONE who had right to the teinds of a whole parish, by a tack conceived to himself and his heirs-male, having sublet to one of the heritors of the parish the teinds of his own lands, taking the duty payable to him and his heirs whatsoever; the Lords preferred the heir-male, and found, That the destination of the principal tack to heirs-male, was not innovated or altered by the sub tack. Dalrymple, 16th November 1698, Hay *contra* Crawford. — A proprietor, who had his estate by inheritance, made a purchase of the teinds of his lands, and was infeft in the teinds by charter and sasine. After his death the question occurred, Whether this subject should go to the heir of line, or of conquest; the Lords preferred the heir of line, who, in this case also, succeeded to the land-estate. 17th December 1736, Greenock *contra* Greenock. — The late Earl of Selkirk superior of the lands of Balgray, having made a purchase of the property, but without completing the same by a resignation *ad remanentiam*; the Duke of Hamilton his heir of conquest claimed the same as being a separate subject, not consolidated with the superiority; the Lords found, That they belonged to the Earl of Rutherglen, who was heir of investiture of the superiority; and the same was found with regard to the teinds of Crawford, purchased in by the defunct, the lands being entailed upon the Earl of Rutherglen. 8th January 1740, Duke of Hamilton *contra* Earl Selkirk. — A charter proceeding upon a resignation *in favorem*, the grant whereof was to the resigner, & *hæredibus quibuscunque*, *hæredes quicunque* were interpreted to be the heirs of the former investitures, which, in this case, happened to be heirs-male. January 1727, Competition Marquis of Clidisdale with the Earl of Dundonald.

What heir understood by the term, *Heir whatsoever*.

When an entail is at an end, does the heir whatso-ever succeed.

WHERE an entail is in favours of heirs-male and assignies whatso-ever, whether contained in an original feu, or posterior infestment; found, That, upon failure of the heirs-male, the right devolves to the King as *ultimus hæres*, and that the heirs of line cannot succeed. Fountainhall, Home, 25th July 1688, Somervell *contra* Tennant.

SUMMAR APPLICATION.

ANY person, tho' not a member of the college of justice, is bound to answer summarily a complaint of contempt of the Lords authority. Falconer, 21st December 1681, Ld. Lamerton *contra* Earl of Home.

THE house of Lords having reversed a sentence of the court of session, and given an order, That the Court of session should tax and modify the appellant's expences; it was found, That this might be done by a summar application, without a new process, only that the party must be cited by a diligence summarily to answer. Forbes, 21st, Fountainhall, 25th July 1711, Sir Andrew Kennedy *contra* Sir Alexander Cumming.

A BARON having, by decret of his own bailie, dispossessed another of certain lands, after the possession had been continued more than seven years, the Lords, upon a summar complaint thereof, reponed the party to the possession, upon finding caution for the intromissions. Forbes, 27th December 1711, Lady Enterkin suppliant *contra* Ld. Enterkin.

THE Lords, upon a summar application, took trial of a forgery, being in a poor man's cause. Fountainhall, 15th November 1677, Thomson *contra* Rofs.

A MINOR, with concurrence of his friends, craving by bill, that his tutors might be removed as suspected for not making inventories in the terms of the act of parliament, the Lords refused the desire of the bill, and remitted them *ad actionem ordinariam de removendo suspecto tutore*, tho' it would get summary dispatch when raised and executed. Fountainhall, February 1700, Hamilton *contra* Lord Elibank.

SOME tutors craving, by petition, the Lords authority to the sale of some lands in Anstruther belonging to their pupils, the necessity, because of debt, being evident, and the smalness of the subject not being able to bear a process; the Lords rejected the bill as irregular, and found that pupils lands could not be sold, but judicially upon a cognition and trial, comparing the rental with the debts, and that by way of process only, and not summarily on a bill, and thought the drawer of such informal petitions, contrary to our first stiles and customs, deserved to be reprimanded and rebuked. Fountainhall, 16th July 1706, supplicants.

Two sheets of the narrative of a disposition, being torn off by carelessness or accident, the Lords, upon a summar application, allowed the tenor of these two sheets to be made up by the oath of the writer and his servant, who had a scroll of the disposition writ with his own hand. Forbes, 17th July 1712, Janet Home suppliant.

SUMMAR

SUMMAR DILIGENCE.

AFTER the death of the liferentrix who liferented the principal mansion house, the heretor, upon a bill to the Lords, obtained a charge upon fix days to be directed against the possessors, under the pain of denunciation, and this without citation of the parties. Durie, 15th March 1628, *Ld. Haltoun* supplicant. — The like, with regard to the superior who had a declarator of nonentry. Sinclair, December 1542, *Cunningham contra Cunningham*. Colvil, February 1583, *Ker contra Ker*. In which cases it was found, That he needed not be infest upon his decret of declarator, being already infest in the lands as superior. — An apparent heir petitioning the Lords to remove the former heretor's relict from the mansion house, she not being liferentrix thereof, the Lords refused the bill, because tho' these removings are to be summary by our law, yet they must always be upon citation and process. Fountainhall, *ult.* February 1699, Viscount Frendraught *contra* Viscountess.

Summar diligence at the heir's instance for getting possession of the mansion house.

A MINISTER having a glebe designed to him, may charge summarily the possessors to remove, which is a favour granted to them for their greater expedition. Spotiswood, (*Suspension*) 6th February 1628, Hannay *contra* Rutherford.

At the minister's instance for removing the possessors of the ground designed for a glebe.

A DEPOSITAR of a sum of redemption-money, being summarily charged to exhibite the same, found, That he not obeying, letters might be directed to denounce him, he not having suspended the first charge, and this tho' the letters were only granted *incidenter* against him in an action of redemption wherein he was not called nor was a party. Durie, 21st January 1632, Grierfon *contra* Gordon.

Against a consignatar.

A BOND bearing only, *Constitutes* our procurators, was found not registrable in order to diligence, but only in order to conservation. Forbes, 27th July 1710, Colonel Erskine supplicant. — A clause in a writ, consenting to the registration thereof in the books of council and session, that all execution might pass thereon in form as effects, without the usual words, *That a decret might be interponed thereto*, was notwithstanding sustained as a sufficient warrant for summary diligence by horning. Forbes, 29th July 1713, Montgomery *contra* Montgomery.

Registration for summar diligence.

A MAN having in his son's contract of marriage, granted to his son's spouse certain lands for her jointure, and obliged himself to make them worth a certain sum yearly, may be summarily charged to make up what is deficient, without any previous process or declarator upon the contract, or as to the avail of the lands. Durie, 15th July 1642, Lady Garlies *contra* Earl of Galloway.

Summar diligence upon a contract of marriage.

A PARTY in whose favours some clause in a contract is conceived, tho' he be not contractor, may raise summar charges upon that clause against the party obliged to fulfil it, without necessity of an action. Durie, 29th January 1628, Lord Whittingham *contra* Spence. — The

Summar diligence at the instance of a third party in whose favours a stipulation is conceived.

heirs of a wife, to whom in her contract of marriage the half of the conquest was provided, were found to have no summar diligence against the husband upon the contract to make over the conquest to them; for in this case the demand was not relevant, tho' it had been made in an ordinary process, a husband in such a case not being bound to denude himself of the conquest during his life. Durie, 15th January 1635, Shanks *contra* Eistons.

Summar diligence against the magistrates for the town's debt.

DECREET being obtained against the bailies of Hawick, succeeding magistrates were found obliged to obey the same without other transference than letters of horning and summar charges. Durie, 15th January 1624, Lord Drumlanrick *contra* Bailies of Hawick. ---- The magistrates and council of Edinburgh having granted them to be debtors to the Lady Swinton by way of act, letters of horning were granted upon the said act against the magistrates, being cited upon 24 hours, tho' it was alledged they were not convenable *hoc ordine*, by suing letters of horning upon a bill, seeing it ought to have been by an ordinary summons, craving either payment or letters conform. Stair, 19th February 1663, Lady Swinton *contra* Town of Edinburgh.

Summar diligence for annualrent where it is not stipulated.

A TOCHER being provided to be employed upon annualrent for the use of both the spouses, the Lords sustained a charge against the representatives of the wife's father who engaged for the same, not only for the principal, but also for the annualrents thereof, for the time he had kept it in his hands, notwithstanding that by the contract he was not obliged in annualrent; and therefore alledged, that the charger should seek annualrent by way of action, and not *hoc ordine*; and this because the defender, by retaining the sum, hindered the employment thereof. Spotiswood, (*Charge*) 18th November 1630, King *contra* Hart. ---- Tho' annualrent be due after denunciation, it must be sought by way of action, and cannot be summarily charged for. Durie, 2d July 1629, Purveyance *contra* Ld. Craigie.

No summar diligence against the pupil for a debt contracted by his tutor.

FOUND, That a decret-arbitral, upon a submission entred into by a tutor, could not afford the ground of a summary charge against the pupils, but only the foundation of an action. Fountainhall, 18th January 1711, Ayton *contra* Scot.

Bond sign'd by initials.

A BOND signed by initials cannot be registred in order to summar diligence, but must be made effectual by way of action. Haddington, 17th January 1611, Carnoway *contra* Ewing.

SUMMAR PROCESS.

FOUND, That an adjudication upon a renunciation to enter heir, could not be summarily called among the acts, but that it ought to be seen *in communi forma*; because, *1mo*, In the present case it was the first adjudication, and so there was no hazard of the pursuer's being prevented. *2do*, For a more general reason, *viz.* That the apparent heir,

heir, tho' renouncing, had interest to see that there was no other lands foisted into it: Fountainhall, 24th November 1685, Lord Yester *contra* Earl Lauderdale. — The Lords sustained summar adjudications without inrolling, (as they had done in other cases before) tho' there were no prior adjudications on the act of parliament 1672, only there were adjudications passed upon the party's renouncing to be heir. Fountainhall, 29th July 1680, Countess of Home *contra* the Earl.

IN a compt and reckoning, one of the parties claiming credit for the sum in a bond assigned to him, was allowed summarily in that process to bring a proof of the tenor of the bond, and of the *casus amissionis*, without necessity of raising a formal process of proving the tenor, tho' these summary tenors are seldom allowed, except where writs are lost in processes by advocates, clerks or agents. Fountainhall, 13th July 1680, Home *contra* Home.

SUNDAY.

IN a pursuit upon a bond, it was alledged for the defender, and offered to be proved by the pursuer's oath, That the bond was truly subscribed on the Sabbath day, tho' it bore the date of the day after, and consequently null; which alledgeance the Lords repelled. Marcus, (Bonds) March 1684, Duncan *contra* Bruce. Voluntary deed executed upon Sunday.

PREMONITION being made to the party's heir apparent, the Lords sustained the order, altho' the day assigned to come and receive the sum was a Sunday; because the sum contained in the reversion needed not much telling, being only a rose-noble. Spotiswood, Auchinleck, (Redemption) Durie, 26th June 1628, Ld. Newark *contra* Maxwell his son. Order of redemption used upon Sunday.

MAGISTRATES being charged to apprehend a rebel with caption, and the charge being given on Sunday, 'twas found, That the charge was not null, but yet that the magistrates were not bound to obey it, being given on such a day; but it being offered to be proved, that the rebel was in the magistrates company thereafter, at which time they ought to have apprehended him by virtue of the former charge, the alledgeance was found relevant to be proved by their oaths. Spotiswood, (Caption) 19th November 1628, Rae *contra* Bailies of Dalkeith. Durie, ult. July 1628, Rachelet *contra* Lauder. Charge of horning given upon Sunday.

POINDING executed on a Sunday null. Durie, 9th February 1622, Mortimer *contra* Scrimzeour. — A comprising sustained, tho' the letters were signed upon a Sunday, and the bill, which was the warrant thereof, was dated on a Sunday; but the Lords inclined to make a statute to prohibit the like in time coming. Durie, 24th February 1627, Earl Cassils *contra* M'Martin. — Arrestment executed upon Sunday found null. Stair, 3d February 1663, Oliphant *contra* Douglas. — An inhibition, tho' of a very old date, being quarrelled on this head, That by the kalendars and almanacks produced in process, Other legal diligence upon Sunday.

it appeared, that the day of the execution was a Sunday; the Lords found this nullity both relevant and proved, and therefore reduced the inhibition. Fountainhall, 17th January 1702, Forbes *contra* Earl of Aberdeen.

SUPERIOR and VASSAL.

Suit in presence at the superior's head-court.

FOUND, That vassals holding ward, by the nature of the holding are bound to appear at the superior's head-courts without any warning; but that vassals by feu or blench-holding, infest *cum curiis pro omni alio onere*, are not obliged so to appear, (except it be otherwise provided in the infestment) nor at any other of his courts, except upon particular citation lawfully made to them by way of process, in cases where they ought to compare to answer there. Durie, Spotiswood, (Courts) Auchinleck, (Tack-duty) 12th March 1630, Bishop of Aberdeen *contra* his vassals. — The Lords found vassals holding blench or feu not liable to give suit and presence at the superior's head-courts. Fountainhall, 17th January 1700, Earl of Linlithgow *contra* Dallas. — The vassal is not exempted from personal presence in his superior's courts, tho' he hold other lands of the King and other superiors, at whose courts he behoved also to compare. Haddington, 12th February 1623, Innes *contra* Grant. — The vassals of a Lord or Baron cannot be unlaured for not compareance at the head-courts, unless they be kept on the ordinary days usually observed, or being changed, they be particularly warned to that court. Haddington, 15th March 1622, Ld. of Buchane *contra* Clunie-Gordon.

Vassal may brew without the superior's licence.

THE Lords found, That a feuar being infest in his feu by his superior, may brew or use any other manufactory without the superior's licence; and that these words, *cum breweriis*, in a charter, are only exegetick, and that the nature of the feu did imply the same, tho' not expressed. Falconer, 24th December 1681, Nisbet *contra* .

Casualties due *si petantur tantum*.

FOUND, That a vassal holding his lands blench of the superior for payment of a stone of wax at Martinmas *si petatur*, was not obliged to pay the bygone duty tho' now sought, because it was not required before the next term. Haddington, 26th July 1610, Archbishop of St. Andrews *contra* Lady Torfonce. Hope, (Feus) Haddington, 18th June 1611, Archbishop of St. Andrews *contra* Ld. Torfonce. Durie, Hope, (Feus) 16th February 1627, Lord Semple *contra* Blair.

Superior cannot interpose another betwixt himself and vassal.

A SUPERIOR cannot interpose any person betwixt himself and his immediate vassal. Stair, 30th January 1671, Douglas *contra* Vassals. Home, December 1682, Ld. of Monimusk *contra* Marquis of Huntly. — The King cannot interpose a superior betwixt him and his immediate vassal; yet the Marquis of Argyle being forfeited, and M'Leod, who was Argyle's vassal, being retoured and infest, as holding his lands immediately of the King; this did not hinder the King to interpose the Earl of Argyle as donatar to his father's forfeiture, seeing

ing the King had done no deed to accept M'Leod as his immediate vassal, except that he was infeft by precept out of the chancery passing of course. Stair, 26th November 1672, Earl of Argyle *contra* M'Leod. — The like. Forbes's MS. 8th July 1714, Duke Gordon *contra* M'Intosh. — Found, That the King could not interpose a superior betwixt himself and those who became his vassals, by the act of annexation of kirk-lands to the crown. Haddington, 6th November 1610, Colonel Stewart *contra* Ld. of Abbotshall.

FOUND, That a superior (whatever be the manner of holding) is not bound to enter his vassal till he pay to him the retoured duties of the lands during all the time they were in nonentry; because it was thought hard to compel the superior to infeft him, and then to be put to an action for the bygone duties, which are ordinarily of no great value. Durie, Haddington, Hope, (*Superior*) 1st July 1623, Ld. Covington *contra* Captain of Crawford. Spotiswood, (*Entry to Lands*) 16th July 1628, Earl Wigton *contra* Lord Yester. — But this being flatly contrary to Sir Thomas Craig's opinion, *lib. 2. dieg. 14.* a distinction was thereafter found, *viz.* where the retour containeth a liquid silver duty, that all the bygones thereof must be paid before the superior be obliged to infeft his vassal, as in the above decision; but where the duty is not constitute nor liquid, as in ward-lands, 'twas found an unreasonable thing to allow the superior to refuse to enter the vassal for not payment of the nonentry duties subsequent to the ward, but that he must pursue for it by way of action. Durie, 23d January 1630, Peebles *contra* Lord Ross. — The representative of a vassal who had subfeued, charging the superior to infeft him, and the question being, whether before entering him he should only pay to the superior the bare duty which he was yearly to get from the subvassal, or the whole rent of the lands; the Lords found, That he ought to enter him upon payment of the first mentioned duty. Durie, 15th February 1634, Goodman of Monkton *contra* Lord Yester. — The Lords found, That the mediate superior was not bound to receive the vassal till all the nonentry duties of his immediate vassal were paid. Durie, 29th July 1624, Ld. Caprington *contra* Ld. Keir.

ENTRING an heir by a precept of *clare constat* is *meræ voluntatis* of the superior, and what he is not bound to by law; and upon his refusal the heir must obtain himself retoured, and thereupon get precepts out of the chancery requiring the superior to infeft him. Stair, 18th July 1678, Fullarton *contra* Denholms. — The Lords found, That letters of horning cannot be directed against bailies of royal burghs to infeft by hasp and staple, because such infeftment is like that by a precept of *clare constat*, which no superior can be forced to grant, especially there being an ordinary remedy, by a special service, and thereupon to charge the bailies. Gosford, 15th July 1668, A burghers of Stirling supplicant.

A VASSAL being entred by the mediate superior, because of the contumacy of the immediate; the Lords found, That tho' the said immediate superior did thereby forfeit his duty of nonentry, yet that all other casualties were still intire to him, and consequently the life-rent escheat; because this casualty, and the like, do accresce to the superior

perior for the vassal's own fault, and the superior cannot be thereby prejudged *sine sua culpa*. Durie, 24th March 1632, Hay *contra* Ld. Auchnames.

Superior
may compel
his vassal to
enter.

FOUND, That as the superior may be compelled to receive his vassal, so may he compel his vassal to enter, and particularly to ward lands after the ward is run out. Colvil, January 1581, Earl Eglington *contra* Ld. Caldwell. — And this was also found in a parallel case, notwithstanding it was alledged, That *nihil deerat* to the superior here, who would be *locupletior* by the vassal's lying out by nonentry. Colvil. March 1582, Laing *contra* Scrimzeour.

Where the
superiority
belongs to
heirs-portion-
ers, how the
vassal is to en-
ter?

A VASSAL is not obliged to take infeftments severally from the heirs-portioners of the superior, to subject himself to many superiors instead of one, but either from the whole jointly, or from the eldest by the prerogative of her birth. Stair, 30th July 1678, Lady Lufs *contra* Inglis.

Singular suc-
cessors, what
sort entitled to
be received by
the superior?

A PARTY who had a voluntary real right, having presented a signature to the exchequer, before the other competitor (who intended to adjudge) had given his citation; yet the Lords preferred the latter, because the other's right was voluntary, and not in a course of diligence, by apprising or adjudication, and found, That, in voluntary rights 'tis arbitrary to his Majesty, as it is to other superiors, to receive or not receive a vassal. Fountainhall, 24th February 1685, Cleland *contra* Dempster. — The act 57, parl. 1474, touching the tinsel of superiority for not obeying a charge to enter a vassal, relates only to the apparent heirs of vassals, and not to singular successors, tho' these may adjudge and compel the superior to receive them. Fountainhall, 8th July 1709, Spalding *contra* Napier. — There being an original grant of ward-lands from the King, bearing *heredibus & assignatis quibuscunque*, this clause was only found to entitle the vassal to assign his right before infeftment, but after infeftment the vassal disponing his lands, it was not found to save him from recognition. Stair, 5th February 1663, Lady Carnegie *contra* Ld. Cranburn. — The like. Stair, 29th January 1673, Ogilvie *contra* Kinloch. — The magistrates of a burgh royal were found obliged to give infeftment to a singular successor upon the prior vassal's resignation, tho' it was pleaded, That superiors are not bound to receive voluntary assignies, in respect, that magistrates are but the crown's officers, of which tenements in town are holden by burgage tenor. Durie, 22d July 1634, Hay *contra* Bailies of Aberdeen. — A superior is obliged to receive and enter all comprisers who charge him, without prejudice of the first compriser's right who was entred before. Durie, 11th March 1628, Fergusson *contra* Couper. Durie, 22d July 1628, Lord Borthwick *contra* Hilston. — A superior was found obliged to receive a compriser's assigney as well as himself. Durie, 12th March 1629, Colmslie *contra* Earl Roxburgh. — The superior found obliged to enter an university, who had acquired right to an adjudication of lands, for debt, tho' he would lose the non-entry duties, &c. because an university dies not. Dalrymple, 11th December 1712, Forbes, 24th July 1713, University of Glasgow *contra* Hamilton.

A SUPERIOR

A SUPERIOR is not obliged to infest a compriser, until he be first satisfied of a year's duty of the lands, conform to act of parl. 1469, cap. 36. Hope, (*Superior*) 3d February 1614, Ld. of Dalmahoy *contra* Bothwell. --- But the appriser is not bound to pay the year's duty until he insist for infestment. Stair, 3d December 1672, Hay *contra* Ld. of Earlston. N. B. It was formerly decided, That the appriser must pay the year's duty, tho' not infest, if he insist for possession. Stair, 22d July 1665, Johnston *contra* tenants of Auchincorse. Which the Lords, as an unreasonable hardship upon both the debtor and creditor, resolved not to follow. --- All the superior can claim for comprisings, be they never so many, is but one year's rent. Gilmour, December 1661, Seton *contra* Rosewell. Durie, 22d July 1628, Lord Borthwick *contra* Hilston. --- And the compriser who pays the same is to be reimbursed by any other, who is afterwards preferred to him. *Ibid.* --- The act 18th, parl. 1669, allowing the superior a year's rent for receiving adjudgers, which they had before for receiving apprisers, has no retrospect. Stair, 15th June 1670, Scot *contra* Ld. Drumlanerick. --- The superior was found obliged to receive a donatar of forfeiture, in virtue of act 2d, parl. 1584, without paying a year's composition. Stair, 25th June 1680, Ld. of Blair *contra* Lord Montgomery. --- A man having granted an heretable bond, with infestment holden base, and a party who had adjudged the right, craving to be entred, but the superior craving a year's rent conform to law; the Lords found, That the superior here being debtor, he was bound to receive this adjudger *gratis*. Fountainhall, 13th February 1702, Creditor of Seton *contra* Seton. --- Magistrates of a royal burgh are not entitled to any composition for entering singular successors. Durie, 22d July 1634, Hay *contra* Bailies of Aberdeen.

THE superiority of certain lands being apprised, the appriser was decerned to pay no more to the superior but a year's duty of what he was to get himself when entred, which was only so much feu-duty payable by his subvassals; and he was not found obliged to pay a full year's duty of the lands, which belonged not to him, but to his subvassals. Durie, 15th February 1634, Ld. Monkton *contra* Lord Yester. Spotiswood, (*Comprising*) 29th March 1636, Cowan *contra* Master of Elphinstoun. --- And a superior having confirmed several infestments of annualrent out of the apprised lands, which exhausted a great part of the yearly profits; the appriser was only bound to pay for his entry, according to the free profits, deducing these annualrents, altho' the annualrents were come in the person of the appriser himself, and disposed to be taken out of other lands, as well as the lands apprised. Durie, 17th July 1630, Lord Erskine *contra* Earl of Home. --- The like. Durie, 18th July 1633, Baird *contra* . --- But a compriser of the subvassal's right, is bound to pay a full year's duty. Durie, *Ibid.* --- And a compriser of feu-duties and superiorities from an immediate superior, who had granted subfeus, after the act of parl. 1606, without the consent of his superior, is liable to pay, for being entred, a full year's rent of the lands, tho' he acquire right only to the feu-duties. Durie, 9th March 1639, Lord Almond *contra* Hope of Carfe. --- A vassal who had greatly improved his feu-lands, being to pay his entry; the Lords found, That the present rental, (not that which was when the purchase was made) is the rule. Bruce, 27th July

Composition
due by singu-
lar successors,
upon being en-
tered by the su-
perior.

What sum
payable in
name of entry
money?

July 1715, Governors of Heriot's Hospital *contra* Hepburn. — No deduction allowed the compriser, tho' the lands be liferented, but payment may be suspended until the liferenter's death, and in the mean time sufficient security. Durie, 18th July 1633, Baird *contra* Durie, 11th March 1636, Scot *contra* Elliot. — If the debt in the comprising be small, the Lords will modify the year's rent proportionally. Durie, 30th March 1637, Paterson *contra* Murray.

Singular
successor entitled
to be entered
without
paying up by-
gone duties.

A SUPERIOR cannot refuse to give infeftment upon a comprising deduced against his feu-vassal, upon pretext of bygone feu-duties resting owing, because the singular successor is not liable to pay the feu-duties that have become due before the date of his right, and the superior is at no loss, seeing he may point the ground for the same. Durie, 17th July 1630, Lord Erskine *contra* Earl Home. Durie, 29th March 1636, Cowan *contra* Lord Elphinstone.

Superior
bound to enter
the vassal, re-
serving always
his own right.

A PERSON being charged, by virtue of precepts upon a retour, to enter a vassal, and he suspending upon this reason, That he was not superior, yet the letters were found orderly proceeded, but prejudice of the rights of all parties having interest, and in particular, that it should not derogate from the suspender's right, which was a claim to the property itself. Durie, 21st December 1626, Town of Edinburgh *contra* Logan. — A superior having suspended a charge to infeft the vassal, and consigned a precept of sasine in the clerk's hands, but alledging that he had a reduction depending of a charter granted by him to the charger's father, which behoved first to be discussed; yet the Lords ordained the precept to be given up to the charger, for otherwise they thought that all charges out of the chancery might be eluded and put off by a reduction. Spotiswood, (*Chancery*) 13th July 1627, Seton *contra* Home. — It being alledged for a superior charged to infeft the apparent heir of his vassal, That the lands belonged to himself upon the account of recognition incurred by the father, this was not found sufficient to stop the entry, seeing the recognition was not declared, but the Lords, in their decret, made a reservation of whatsoever was the superior's right *prout de jure*, wherein they declared, That he should not be prejudged by his necessary obedience in entering the vassal. Durie, 23d January 1630, Peebles *contra* Lord Ross. — The magistrates of a burgh being charged as superiors of a neighbouring barony, to infeft a man as heir to his father, and they suspending, and offering a precept, containing a reservation of all the privileges the town had over that barony, which the charger refused to accept in any other terms than the old stile; the Lords ordained them to enter the vassal conform to the old infeftments; but in the decret of suspension it was declared, That the entry of the vassal should be without prejudice of the superior's right *prout de jure*. Auchinleck, (*Superior*) 3d July 1636, Johnston *contra* Magistrates of Edinburgh. — A superior is bound to infeft his vassal or subvassal, whatever right he may have in his own person, which is always reserved to him by a *salvo jure suo*. Stair, Gosford, 28th June 1672, Menzies *contra* Ld. Glenurchy.

Superior
may redeem
apprisings led
against his
vassal.

ALTHO' a superior has his choice, either to receive an appriser, or pay him off, and take the lands to himself; yet the Lords found, That his

his offer to pay must be *tempestive*, and that his offer at the bar, after running the course of three consecutive charges, and his suspending at length the letters, was out of time. Maitland, 27th February 1566, Brown *contra* Abbot of Dunfermline. — The superior may still redeem the lands from the compriser, upon payment of the sums comprised for, if the legal be not expired. Durie, 5th March 1634, Black *contra* Ld. Pitmedden. — The superior has his option in adjudications as well as apprisings, either to give infeftment or to purchase them in upon payment of the sums contained therein; but the debtor can redeem again from the superior upon payment of the like sums, without any thing, for a year's entry. Stair, Gosford, 10th June 1671, Scot *contra* Lord Drumlanrick. — Adjudication being led for debt exceeding the value of the lands adjudged, found, That the superior must either enter the creditor, or pay the value of the lands adjudged, to be determined by the Lords upon a probation thereof; and upon such payment, that the creditor must transfer his debt and diligence to the superior, with absolute warrandice for the sum received, reserving to the creditor his claim against the common debtor, so far as not satisfy'd out of the value of the lands. Forbes, 24th July 1713, University of Glasgow *contra* Hamilton.

In an adjudication after the new form, by sale and roup of bankrupt lands, the Lords found, That the act of parliament 1469, allowing superiors to purge apprisings, and take the lands to themselves, took no place. Fountainhall, 17th December, 1695, Kennedy *contra* Earl Cassils.

In a declarator of nonentry, at the instance of the Marquis of Queensberry, as Lord of Torthorrel, against the Earl of Annandale, as heretor of the lands of _____, alledged for the defender, The saids lands not being expressly contained in the pursuer's title deeds, they can only be claimed as part and pertinent, and since the defender denies that they are part of the Lord Torthorrel's estate, and asserts that he and his predecessors stood vassals therein to the King for the space of 40 years, the pursuer ought *in initio* to make up his title, by proving that they are part and pertinent. Answered, The defender, if he controvert the pursuer's right of superiority, may disclaim it on his peril. The Lords found the pursuer needed not prove part and pertinent, but that the defender might disclaim on his hazard, the process not being designed to take away the defender's property, but only for claiming the casualties of superiority, where no superior was competing. *Harcus, (Nonentry)* February 1683, Marquis of Queensberry *contra* Earl Annandale. — In a declarator of nonentry, at the instance of the Earl of Marischall *contra* Gordon of Fechil, it was alledged for the defender, That he was only mediate vassal to the pursuer, and immediate vassal to my Lord Forbes, who was not called. Answered, If the defender controvert the pursuer's right of superiority, he must disclaim; the Lords found the defender obliged, either to acknowledge the pursuer for his immediate superior, or to disclaim upon his hazard. *Harcus, (Nonentry)* February 1688, Earl of Marischall *contra* Gordon of Fechil.

METHOD of obtaining infeftment by heirs and apprisers. See Infeftment.

SUPERIOR acquiring a gift of his own ward, marriage, &c. must communicate the benefit to his vassals. See *Jus superveniens auctori accrescit successori*.

SURROGATUM.

IF a wadset tenement, wherein the relict was infest, is redeemed, she must be provided to the annualrent of the sum in the reversion. Haddington, 14th March 1623, *Skeen contra Forbes*. — An order of redemption having been used, and the wadset sum consigned, after the wadsetter's liferent-escheat was fallen, it was found incumbent upon the wadsetter, who had right to this sum, as coming in place of the wadset, to employ the same, or give security to the donatar of his liferent-escheat for the annualrent thereof during the wadsetter's lifetime. Stair, 29th June 1661, *Telfer contra Maxton*.

A MANDATAR having sold his constituent's goods, took bond for the same in his own name, the constituent was found to have a direct action against the purchaser by way of declarator to pay the sum to him. Stair, 9th June 1669, *Street contra Home*. — A person who sold some victual of the growth of lands, whereof he had taken upon him the management in absence of the heretor, taking the price payable to himself, having died before the term of payment, the Lords found that the victual was not the defunct's, and that therefore the price was not *in bonis ejus*, nor could be claimed by his executor-creditor. Forbes, 15th March 1707, *Hay contra Hay*. — John Mathison drover, bound for England with a drove of cattle belonging to himself, took the trust of another drove belonging to James M'Beath, which he undertook to sell upon his account; Mathison dying in England, while a part of this drove remained on hand unsold, Robert Gordon, his fellow drover, disposed of the cattle, took up what money belonged to the defunct, and, after paying his funeral charges, &c. returned to Scotland with L. 130, ready to be delivered to those having best right; in a competition betwixt an executor-creditor of the defunct's and the said James M'Beath, the Lords found the money lying by Mathison at his death, and intromitted with by Robert Gordon, and also the price of the cattle sold and received by Robert Gordon after Mathison's death, was presumed to be the price of M'Beath's cattle so far as extended to the value of the same, and not *in bonis* of Mathison; and therefore preferred M'Beath to the executors-creditors of Mathison. December 1731, *Lord Strathnaver contra M'Beath*.

A PERSON receiving money to buy goods for another, having bought and received them in his own name, without mention of the truster, the property was found to be in him, and his creditors arresting were preferred. Stair, 24th January 1672, *Boylstoun contra Robertson*. — A person having granted a commission in writ to a supercargo of a ship, to export some goods belonging to him, and to sell them in Holland, and with the price to buy some other species of goods for his behoof, which being accordingly done, and the commissioned goods returned, the trustee acquainted his constituent by a letter

letter, that they were put in a cellar for his behoof; thereafter, a creditor of the trustee's pointing these goods, as belonging to his debtor, the constituent raised a process of spuilzie upon this ground, That the goods pointed belonged to him the pursuer. Alledged for the defender, That possession presumes property in moveables, and the pursuer had no bill of lading of the goods pointed as belonging to him, nor was he bound to have own'd them to be his, had they been cast away; so that, till delivery, they were to be reputed the supercargo's goods. The Lords found the property of the goods belonged to the pursuer, and decerned the defender to make restitution, but assolizied him *a spolio*. Marcus, (*Spuilzie*) February 1687, David Steils *contra* David Spence.

ALEXANDER MARTIN being creditor upon the estate of Ryflaw by infestment for upwards of L. 30,000 Scots, the right after his death was adjudged by Doctor Hay and Thomas Calderwood, two of his creditors, in the year 1695. Thomas Calderwood, upon the title of Martin's infestment, carried on a sale of the estate of Ryflaw, and got himself in effect ranked sole creditor, and at the same time became a purchaser, in which process Doctor Hay was at first called, but he died during the dependence, and there was no transference against his heirs, nor appearance made for them; Thomas Calderwood, immediately after the purchase, without being infest, sold the lands to Mortonhall, and made over his decret of sale; Mortonhall paid some part of the price, retaining the remainder in his hand, for which he granted bond, with a quality, That neither principal nor interest should be paid till certain incumbrances were purged, particularly Doctor Hay's adjudication. Sir William Cockburn acquiring right to this adjudication, insisted in a declarator against Thomas Calderwood's heirs and creditors for having it found, that he had a right to a share of Martin's infestment, in proportion to the extent of his adjudication, and ought to be paid at least *pari passu* with Thomas Calderwood; and in respect that Mortonhall got the lands affected by Martin's infestment, made over to him by Thomas Calderwood, and had the price thereof still in his hands, therefore he should be decreed to make part thereof forthcoming to Sir William, that price being a *surrogatum* come in place of the land itself, and being still *in medio*, not divided amongst those who had an interest in the land. Against this declarator it was objected, That Calderwood having purchased the lands of Ryflaw at a publick roup, these lands were thereby disburdened of all the bankrupt's debts, and consequently of Sir William's claim; and that, altho' Calderwood had not made any actual payment of the price, yet, he being himself sole creditor, and likewise sole purchaser, there was an extinction *confusione*, which is equivalent to payment; and that therefore Sir William Cockburn had only a personal action of repetition against Thomas Calderwood, and could not affect the price of the lands in Mortonhall's hands, otherwise than by arrestment, or confirmation as creditor to Thomas Calderwood, the effect of which would be, That Sir William would be entirely cut out by Thomas Calderwood's creditors, who have done diligence, or got assignments for security of their debts. The Lords repelled the objection against the declarator, and found that Sir William has right by progress to part of the sums in Mortonhall's bond effeiring to Sir William and Thomas Calderwood's rights in Martin's debt, and that the sums

in the said bond are to be considered as part of the price of the lands of Ryflaw, due at the sale thereof. 16th December 1725, Sir William Cockburn *contra* Creditors of Thomas Calderwood.

S U S P E N S I O N.

Effect of a
suspension.

A HORNING and execution thereof was reduced, because denunciation had followed after the letters were suspended. Colvil, June 1583, Broomfield *contra* Haitlies. --- A charge of horning having been suspended, and thereafter the letters found orderly proceeded, yet a denunciation upon the former charge was found unwarrantable, being before the decret of suspension was read in the minute book and extracted. Home, January 1683, Brown and others *contra* Chaiplane.

A DECREET-ARBITRAL being given for an annual prestation, and horning raised thereupon the first year, which was suspended upon payment or consignation, a second charge for the next year's prestation was found unwarrantable, because the decret itself being once suspended, a charge could not be lawfully given, until the suspension were discussed. Auchinleck, (*Horning*) 19th February 1630, Ld. Towerlands *contra* Auchinnames. --- Creditors pursuing tenants for payment of a particular year's rent, and being suspended on a multiple-poining, cannot lawfully poind for any other year's rent, till the suspension be discussed. Durie, 24th July 1634, Bruntfield *contra* Trotters. --- A party having completed all the solemnities of poinding corn stacks, but being interrupted by a signetted suspension before the corns were threshed out, and craving, by bill, the Lords direction how to proceed therein; the Lords first issued out a citation against the debtor, to answer the complaint, with certification, if he did not, they would consider the case; and, generally, they thought the suspension, intimated after the poinding was completed, could not hinder the poinder to dispose on the corns, yet superseded to give answer till they saw if he would appear or not. Fountainhall, 6th December 1707, Lanerick *contra* Glaslie. --- The Lords found it unwarrantable in a messenger to commit one to prison, by virtue of a caption, for debt, after intimation of a sist upon a bill of suspension obtained by the prisoner, altho' he was in the messenger's hands, before the sist was intimated or procured. Forbes, 27th July 1710, Lamb *contra* Cleland.

MAGISTRATES being pursued for a prisoner's debt, whom they had unwarrantably set at liberty; this exception for them, *viz.* That, before they set him at liberty, he had suspended the decret whereon he was imprisoned, was repelled, because the suspension contained no warrant to set at liberty, without which, and that they, upon such a warrant, had been orderly charged, they could not, at their own hands, do it; for the suspension might have been discussed against the debtor, and thereby the creditor prejudged. Durie, *penult.* March 1626, Gemmil *contra* Bailies of Glasgow. Durie, 25th June 1642, Wylie *contra* Bailies of Wigton.

IN

IN a process of forthcoming it being objected, That the common debtor had obtained suspension, which behoved to sist all execution ; this was repelled, in respect the common debtor, being called in the process of forthcoming, might repete his reasons of suspension there. Durie, 25th January 1642, Stirling *contra* Aikenhead.

A BOND conceived negatively, That the debtor should remove from a certain service, and abstain in time coming, was not allowed to be suspended *simpliciter*, tho' obedience was given, but only ay and while the debtor transgresses the obligation, and that he might be charged thereupon so oft as he transgressed. Stair, 16th December 1671, Stewart *contra* Willings.

Suspension upon performance of a negative obligation.

A REASON of suspension, that the charger pointed goods in satisfaction of his decret, cannot be proved otherwise than by writ or oath of party ; for reasons of suspension must be instantly verified, and cannot stop for diets to prove by witnesses. Durie, 9th March 1636, Stirling *contra* Hamilton. — Payment being proponed as a reason of suspension, the letters were found orderly proceeded, because it was not instantly verified at calling the cause, altho' it was offered to be proved by the charger's oath, he not being present. Haddington, 29th November 1609, Jerdane *contra* Gordon. — A decret of removing in absence, being suspended upon this ground, That the charger being but one of three heretors *pro indiviso* could not remove the same, was not found competent by way of suspension, seeing it was not instantly verified, but reserved to reduction. Durie, 18th December 1628, Ld. Johnston *contra* his Tenants. — A decret being both suspended and put under reduction for the self same reasons, altho' the reasons seem probable, yet if they be not instantly verified, the letters will be found orderly proceeded, the charger finding caution to refund the sum *cum omni causa* if his adversary prevail in his reduction. Haddington, 1st June 1610, Wright *contra* . — One of two coprincipals being charged for the debt, suspended upon this alledgeance, That the other coprincipal had made payment, which alledgeance he got a term to prove, tho' in a suspension it being *super facto alieno*, emerging after the date of the bond. Stair, 15th July 1665, Urquhart *contra* Blair. — In a process for an apprentice-fee against the father, who was the cautioner, the apprentice's diverting and absence, being referred to the father's oath, and he having deponed, with a quality, that the master had beaten and put away his son ; the Lords found, That the quality being *super facto alieno*, did resolve in an exception, which he should have proponed, and could not be proved by his own oath ; and yet, tho' the process was a suspension, wherein there had been a litiscontestation, the Lords allowed a term to prove the said quality. Dirleton, 6th November 1667, Fife *contra* Daw. — Altho' regularly reasons of suspension ought to be instantly verified, yet, in a suspension of a decret of removing, the master not having been summoned to the said removing, nor mentioned in the decret, notwithstanding he was in feft in the lands with 20 years possession, the Lords assigned a term to him to prove his possession, &c. Auchinleck, (*Suspension*) 20th June 1628, *contra* Lord Carnegy. — In a summar charge against possessors to remove at the instance of a minister, who had the ground designed to him for a glebe ; the defenders, suspending, were allowed terms

Reasons of suspension, if they must be instantly verified ?

to prove, and not bound to verify *instante*, as in ordinary suspensions. Spotiswood, (*Suspension*) 6th February 1628, Hannay *contra* Rutherford.

Second diligence in suspensions.

THE Lords declared, That thereafter all reasons of suspension, consisting in fact and probable by witnesses, shall be proved at one term; and that they will grant no further diets of diligence against the witnesses summoned to that term, tho' the witnesses compare not, but will then conclude the cause without further protracting the process. Durie, 15th January 1624, Ker *contra* Dickson. .

Second suspension upon the same medium.

A REASON of suspension being founded on a writ produced, which was granted by the charger, nevertheless the letters were found orderly proceeded, because there was a former suspension upon the same reason discussed, finding the letters orderly proceeded for not verification thereof; it being found, That the verification could not now be received in a new suspension after a term affixed in the first, as said is. Durie, Auchinleck, (*Incident Diligence*) Spotiswood, (*Suspension*) 28th February 1628, Glen *contra* Ld. Knock.

A party becomes personally liable by suspending, tho' not formerly so.

A DECREE of poinding the ground, being suspended by the heritor, a singular successor not personally liable, and the suspension discussed in the charger's favours; the Lords found, That the suspender was personally liable to pay all the bygones contained in the suspension, and therefore that it was in the charger's option to poind the ground, or to suit the suspender personally. Spotiswood, (*Poinding*) 14th November 1634, M'Naughton *contra* M'Naughton.

Expences in a suspension.

A LIFERENTRIX having obtained decree for certain quantities of victual, as the bygones of her annuity payable in victual, and having discussed a suspension of the same, the question occurred as to the expences. The suspender pleaded, That the victual ought to have been liquidated in the decree, and converted into money, and therefore he had good reason to suspend in order for a liquidation. Answered, It was the defender's part to have applied for a liquidation, upon this medium, that *loco facti imprestabilis succedit damnum & interesse*. The pursuer could not insist for such a liquidation, her claim was the *ipsa corpora*, and had the suspender thought proper to implement the charge by delivering over the *ipsa corpora*, she could not have refused the same, nor insisted for money. The Lords found expences due. 12th February 1735. Gordon of Ardoch *contra* Lady Newhall.

Decree of suspension how to be put to execution?

IN the reduction of a horning upon this reason, That the Lords having found, in the suspension of the charge, that the charger, whose title was an assignation not intimated before the cedent's death, ought to confirm before extracting, which is in effect a turning of the decree of registration into a libel, the debtor ought to have been charged *de novo* upon the decree of suspension, whereas he was denounced upon the old charge. Answered, Custom requires no new charge upon a decree of suspension. Replied, Tho' when a reason of suspension tends only to take off the charge in part, as when a partial discharge is produced, it is reasonable that the old charge go to execution *pro reliquo*; yet it is otherwise when a reason of suspension enervates the charge

charge *in totum*, and the charger's assignation not intimate in the cedent's lifetime, was not a sufficient title without confirmation, which made in effect a new title. The Lords found the horning null, and they thought, that to find the letters orderly proceeded, was not the proper decerniture in the suspension, but that it ought to have run in the terms of a new decret. Marcus, (*Horning*) November 1687, John Hamilton *contra* Colonel Borthwick. — Warrants to discuss upon bills of suspension are equivalent to signet suspensions; and therefore tho' the letters be found orderly proceeded, there can be no execution till the decret of suspension be extracted, after which the charger may either put the letters upon the first decret to further execution, or take new letters upon the decret of suspension. Stair, 18th January 1681, Dick *contra* Chaiplane.

WHAT allégeances receivable by suspension, what by reduction?
See Competent.

CAUTIONER in a suspension. See Cautioner in Suspension.

T A C K.

A RENTAL, wherein the defender was received as kindly tenant to the Duke of Lenox and his heirs, in some acres of land, and also in the keeping of the house of Inchinnan, was sustained to defend against a removing from the house; tho' it was pleaded for the pursuer, That the rental could be no title to exclude the master from the use of his own house, and also, that the right to be keeper of a castle or house is a feudal right, which must be constituted by infeftment. Durie, 29th January 1628, Duke Lenox *contra* Houston.

Subject matter of tacks and rentals.

THE Lords found, That a tack *in prædiis rusticis* did militate against the buyer of the lands, but not *in prædiis urbanis*, because these use not to be under tack, but only set from year to year. Fountainhall, 5th February 1680, Rae *contra* Finlayson.

Tack, what kind, a real right?

FOUND, That there can be no kindly tenant by bare paying of rent, tho' for many years; but that it is requisite he have either tack or rental. Colvil, March 1587, Tutor of Cassils *contra* Ld. Lochinvar.

Who understood kindly tenants?

THE date of a tack (quarrelled for want of an entry) is a sufficient entry, where no other entry is expressed. Fountainhall, 13th November 1679, Seton *contra* White.

Requisites of tacks; and, 1mo, Date.

A TACK set by a husband to his wife for her lifetime, was found null at the instance of his heir, because it contained no tack-duty, nor was it a disposition of a liferent right, because wanting a precept and sasine. Colvil, 7th June 1575, Ld. Grange-Durham *contra* his brother's relict. — The like. Durie, 7th July 1625, Ld. Ayton *contra* Tenants. — A tack, tho' set *sine certa mecede*, yet was found to sub-

2do, Tack-duty.

fist till reduced by way of action, because the setter had given under his hand, that 'he had received (not in yearly duty, but *unico contextu*) a great sum for the same from the tacksmen. Colvil, June 1591, Ld. Mellerstanes *contra* Haitlie. ---- A tack sustained against the setter and his heirs, altho' it was alledged to want a duty, because altho' it bore a yearly duty, yet thereby the setter had discharged that duty to the tacksmen for ever, in place of his bairns part of gear, which was alledged to be alike as if there had been no duty inserted; but the said clause would not have liberated the tacksmen at the hands of a singular successor. Durie, Auchinleck, (*Tack of Teinds*) *ult.* January 1627, Rofs *contra* Blair. ---- A tack after loosing of redeemed land was found not to be null, altho' it contained no duty, it having been provided by the reversion to be set mail free. Haddington, *ult.* July 1605, Ld. Restalrig *contra* Craw. ---- A contract being made by the Ld. of Lundie, whereby he bound himself to suffer a smith to bruik a piece of land during his lifetime, he working the smithwork of Lundie, as well in shoeing his horses as in mending his ploughgraith, was found to be a lawful tack, and that his work was *merces locationis*, and sufficient to maintain him in his possession against a singular successor. Haddington, Lundie *contra* the smith of Lundie.

3^{tie}, *ish.*

A TACK set *in perpetuum* was found null, even at the instance of the granter's representative. Hope, (*Tack*) 15th July 1615, Stewart *contra* Lord Gairlies. --- A rental to a man and his heirs *ad perpetuam remanentiam*, found to endure only for the setter's and receiver's lifetime *conjunctim*. Spotiswood, (*Rental*) 22d June 1627, Earl Galloway *contra* Tenants. --- The Lords sustained a tack, tho' wanting a definite *ish*, but only bearing to continue till a certain sum should be paid, and this against the setter, but not against a singular successor. Auchinleck, (*Tack*) 1st December 1627, Hardie *contra* . ---- A tack which was set to a man and his wife during their life, contained an obligation upon the setter, "to receive the bairns to be procreated betwixt them as kindly tenants after their decease, so long as they were able to pay the tack-duty;" this obligation was not found sufficient to defend the eldest in a removing at the instance of a singular successor in the land, the tack so far as in his favours wanting a definite endurance. Durie, 2d March 1626, Hamilton *contra* Tenants. ---- In a similar case, a tack being set for a limited time, containing this clause, "That the granter should receive the tacksmen and his heirs kindly tenants to him and his heirs, after expiry of the tack;" this obligation was found sufficient to defend the tacksmen against a singular successor pursuing a removing, after the term first condescended upon in the tack was elapsed; because this clause imported that the tack should continue during the life of the survivor, whether setter or tacksmen, and therefore upon the matter it was the same as if the tack had been set for a limited time. Durie, 6th February 1633, Gordon *contra* M'Culloch. --- In a removing the tenant alledging that the tack had a provision, That he should not be removed if he found such a man named cautioner for the duty; the Lords sustained the tack tho' it wanted an *ish*, as being during the tacksmen's pleasure, which ended with his life. Fountainhall, 25th June 1680, *contra* Ferme. --- Carruthers of Holmains, in the year 1680, granted a tack to William Irvine of the following tenor:

Sets

Sets, and in rental lets to the said William the foresaid five pound land, as then possessed by him and his tenants, and that perpetually and continually as long as the grass groweth up and the water runneth down, and obliges him and his heirs, &c. to renew the present security and right of the said five pound land to the said William Irvine, his heirs and successors, ay and while they find themselves sufficiently secured in the said lands ; in a removing at the instance of the heir of the granter it was objected, That this tack or rental was null, as wanting an ish. Answered, A tack or rental wanting an ish is indeed not good against singular successors, at the same time it can hardly be doubted but a proprietor has it in his power to grant such an obligation to his tenant that shall be good against himself and heirs for ever. This is no unlawful obligation, none of these that are reprobate in law. The Lords found, That by the meaning of parties the contract was intended to be a perpetual right to the tenant and his successors, and therefore assailed. 23d January 1717, Carruthers contra Irvine. See Durie, 26th July 1631, Crichton contra Viscount of Air. ---- A tack being set for an elusory tack-duty, and for an endurance of 2400 years, was found not to have the benefit of the act of parliament in favours of tenants, and therefore not good against singular successors. 3d February 1730, Alison contra Ritchie. ---- In a declarator of the crown's kindly tenants of Lochmaben contra Viscount of Stormont, the Lords found, from some ancient documents produced, That the pursuers, tho' having neither charter nor sasine, but as tenants paying their rents to the Viscount of Stormont, had yet such a right of property in the lands that they could not be removed, and might dispoise their rights to extraneous persons. 24th November 1726.

AN indefinite rental containing no term of endurance, was refused to be sustained for life, unless the custom of the barony were proved by writ to be so. Hope, (*Rental*) 10th December 1619, Corsby contra Donaldson. --- An indefinite rental, mentioning no time of endurance, bearing only, that the person in whose favours it was granted, should be received as kindly tenant to the setter and his heirs, was found to endure during the joint-lives of the setter and retaller. The like found, tho' the clause had been, that the rentaller and his heirs were to be received kindly tenants to the setter and his heirs. Durie, 5th July 1625, Ld. of Ayton contra Tenants. ---- Found, That a rental given to a man and his heirs, ought to last for the life of the first heir of him to whom the rental was given, and no longer, conform to the Roman law, *l. 14. cap. De usufruct.* which the Lords declared they would follow in all time thereafter, when the like question should occur. Durie, Spotiswood, (*Usufructus*) 13th March 1632, Ahanay contra Ayton. Durie, Auchinleck, (*Rental*) 15th March 1631, Earl of Galloway contra Burgessies of Wigton. Forbes's MS. 17th December 1713, Earl of Nithsdale contra Ld. of Bishoptoun. --- A tack being set for a limited time, containing this clause, " That the granter should receive the tacksmen and his heirs kindly tenants to him, and his heirs after expiry of the tack, " this clause was found to import, that the tack should subsist during the life of the survivor, whether setter or tacksmen. Durie, 6th February 1633, Gordon contra M'Culloch. --- A rental bearing, " That the granter should receive the rentaller's children, after him, as kindly tenants,

Indefinite
term of endu-
rance, how li-
mited?

" on such conditions as they should agree upon, " found sufficient to defend the rentaller (after his father's death) from removing, he giving the same grassum, and yearly duty as others of the pursuer's kindly tenants did, for like lands, and to last for like years, as used to be allowed to others, and on such other conditions as were usual. Durie, 2d July 1630, *Ld. Rowallan contra Boid*.—The like. Durie, 11th March 1626, *Ld. of Corshill contra Wilson*.—A rental whereby the setter obliged himself never to remove a tenant, nor his children, from the lands, found sufficient to defend the children in a removing at the instance of his heir, and that the same was not to be constructed as a personal obligation upon the setter only, but was equally obligatory upon his heirs. Durie, Spotiswood, (*Rental*) 26th January 1627, *Agnew contra Earl of Caillis*.

IN a removing against a tenant, who had entred into possession, in virtue of a minute of tack, which bore no term of endurance; it was pleaded, That a tack wanting an ish, is void and null, Stair, title *Tack*. § 27. such a tack must be perpetual or nothing. 'Tis a principle, that all obligations are, in their nature, perpetual; therefore there can be no *medium*, but either that the tack is null or perpetual: For supposing it once legally constituted, there is nothing to limit the endurance. Answered, Tho' other obligations be, in their nature, perpetual, this is inconsistent with the nature of a tack; and therefore it must be *in arbitrio judicis* to fix the time of endurance: And, as to this, there are clauses in the tack, which shew it was intended to endure longer than one year, such as, that the tenant is tied to muck a certain quantity of ground yearly, to bring home to his master, every year, 20 loads of coals, &c. The Lords sustained the tack for two years. 22d November 1737, *Redpath of Angelraw contra White*.

Competition
betwixt tacks.

THE first tack of teinds, with the first inhibition, was preferred to the second tack, altho' clothed with natural possession. Colvil, February 1585, *Wardlaw contra Otterburn*.—A spuilzie of teinds being pursued by the subtackfman's assigney; and this exception being proponed for the defender, *viz.* That he had a subtack from the same tackfman, which, tho' posterior in date, yet was clothed with continual possession, ever since the principal tackfman ceased to possess, whereas the pursuer never was in possession; this exception was sustained. Durie, 23d June 1627, *M'Millan contra Gordon*.—The Lords preferred a compriser of a tack of teinds, who had first apprehended possession, to a subtackfman, who had not attained possession, altho' the subtack was prior. Auchinleck, (*Comprising*) 20th July 1630, *Rofs contra Town of Perth*.

Competition
tacks with o-
ther rights.

WITHOUT natural possession a tack is but personal, and not effectual against singular successors. Stair, Dirleton, 24th February 1676, *Cullen contra Town of Aberdeen*. Hope, (*Tack*) Frazer *contra* Lord Pitligo. Durie, 22d November 1632, *Hamilton contra Tenants*.—A tackfman not having apprehended possession of the lands contained in his tack, before the same be annalzed heretably to another party; in a removing, at the instance of the purchaser, the tackfman may not defend himself by this tack, and possession apprehended after the pursuer's infestment. Haddington, 22d January 1611, *Lord Pitligo contra Philorth*.—A tackfman having granted a subset, and there-
after

after renounced the tack in favours of his master, the master was preferred, for tho' the subtacksman was in the natural possession before the date of the renunciation, it was upon a separate title, and not *quod* subtacksman. Durie, 28th July 1625, Earl of Morton *contra* Hamilton. — A tack being set after there was a feu of the same land granted to another party, which feu was not known to the tacksman; 'twas found, That the tack behoved to stand till it ran out, because of the tacksman's *bona fides*. Maitland, 14th December 1570, Home *contra* Tenants of Oldhamstocks. — A tack was preferred to a comprising, in respect it was set before the denunciation, and cled with possession before *fasine* on the comprising; but thereafter, it having been made appear to the Lords, that the comprising's *fasine* was prior to the possession attained by the tacksman, they preferred the comprising, altho', before the *fasine*, the tacksman had executed summons of mails and duties against the tenants of the lands, upon which he afterwards recovered decreet. Durie, 11th July 1627, Wallace *contra* Harvey. As to the first branch, See Durie, 25th March 1628, Blackburn *contra* Gibson. — One possessing by a tack, getting a new tack for a lesser tack-duty presently to commence; it was found, That he might ascribe his possession to the new tack, so as to prefer him to a singular successor in the lands. Stair, 21st June 1671, Neilson *contra* Menzies. Gosford observes this decision differently, as if the second tack were a prorogation of the first, and to commence after expiry thereof.

A PARTY having gotten a tack of teinds, and a second to commence at the expiry of the first, and a third to begin at the outrunning of the second; in a removing at the instance of the purchaser of the lands, the Lords found, That the tacksman could not defend himself by the third tack, the second not being outrun at the time of the sale. Haddington, 5th January 1602, Ld. Drum *contra* Jamison. — Found, That tenants having tacks for terms to run, and other tacks, the entry whereof to be at the ish of the first, may defend themselves thereby, altho' the fether should sell the lands before the entry of the last tack, which will not thereby be reputed to be conferred *in tempus indebitum*. Haddington, 7th March 1604, Preston *contra* Tenants of Dudington. — A tack was sustained against a singular successor, altho' it was not to commence for two years after the said singular successor's right, because the tacksman was in possession by virtue of a prior tack, and the new one to commence at its outrunning, both which tacks were lawfully set *ab initio* before the singular successor's right. Durie, Haddington, 20th July 1622, Mackcarro *contra* . — A proprietor during the currency of a first tack, having granted a second to commence at the expiration of the former, did, after the date of the second tack, but before expiration of the first, sell the lands; the question occurred, if this second tack was good against a singular successor: On the one hand it was contended, That here was a tack, and here was possession, all that was necessary by the act of parliament to make tacks good against singular successors. On the other hand it was contended, That no tack is a real right, or good against singular successors, unless that whereupon possession has actually followed; that the tacksman has all along been in possession by virtue of the first tack, and that the second tack can in no view be considered as any how better than a simple personal obligation upon the proprietor to

Prorogation
of a tack, in
what case good
against singular
successors?

grant a new tack to this tacksmen after expiration of the former, and which cannot be a more effectual obligation to him, than if granted to any third party who never was in possession, good indeed against the granter, but by no means against singular successors. The Lords sustained the second tack good against the purchaser.

January 1725, Richard *contra* Lindsay. — A tack being set for nineteen years, to begin after the ish of another tack then not run out, but suspending the entry till a sum were paid to the tacksmen by the setter of the tack; this tack found not sufficient to defend against a compriser pursuing either for mails and duties or removing, the sum having been paid after comprising, and so the entry of the tack was conferred *in tempus indebitum*. Durie, 3d March 1630, Maxwell *contra* Tenants.

Tack contrived as a security for debt, good against singular successors, provided it have a tack-duty and definite ish.

A TACK being set to a creditor, without any other ish than till he should be paid of his money, the Lords considered that the payment of the sum was an indefinite ish, if so be that the rent of the land did no more than pay the annualrent of the sum, in which case they declared they would not sustain it as a valid tack, but if there was a superplus, so that by intromission within such a number of years, he would be paid of the whole, that then it should subsist as a good tack. The author here remarks, That if tacks were so far extended, then wadsets and other heretable rights would be disused, which through the intimation given by their registration are more secure to the lieges. Fountainhall, 10th February 1698, Cockburn *contra* Simson. — A tack being set for a definite space of time for payment of 1300 merks of tack-duty, and two dozen kain fowls, with a clause of retention of the tack-duty, for satisfaction of the annualrents of a sum due by the setter to the tacksmen, which annualrents amounted to 1300 merks yearly, there being here a definite ish, and a certain tack-duty, *viz.* two dozen kain fowls, the tack was found effectual against a singular successor by infestment in the lands. Stair, 11th December 1677, Oliphant *contra* Currie. — A tacksmen getting a bond from the setter of the tack, granting that he had borrowed a sum from the tacksmen, and allowing him to retain possession of the tenement till he were paid, and also to retain his annualrents out of the first end of the tack-duty; the Lords found this a real right, even against a singular successor, and that it had the force of a tack, altho' it was alledged that it had no ish, because it really had an ish, tho' indeterminate, *viz.* whenever the debt should be paid. Durie, 22d January 1625, Ronald *contra* Strang.

What if the tacksmen be allowed to retain the whole tack-duty?

LANDS wadset being liferented, and therefore the heretor setting a tack to the wadsetter of other lands in lieu thereof, to be enjoyed during the life of the liferenter, without any duty; after the setter's decease, his relict being kened to her terce of the lands set in tack, and pursuing removing therefrom, the Lords found, That the tack could not defend the tacksmen, seeing it wanted a duty, tho' granted in recompence of the wadset, for if it had contained a duty, the lady tercer would have had right to her proportion thereof, how little soever it had been. Durie, 20th June 1629, Keith *contra* Ogilvie. — Where a tack contains a definite ish, it is good against singular successors, tho' the tack-duty be wholly allocated for payment of the annualrents of a sum owing by the setter to the tacksmen. Fountainhall, 13th November 1679, Seton *contra* White.

By

By contract, lands being disposed, not in the form of a real right, ^{What if the} but simply to be possessed, without paying any duty in place of the ^{if be indefi-} annualrent of a sum owing by the disponer, and with power to retain ^{nite, depend-} possession till the principal was repaid, this was not found good to de- ^{ing upon the} fend against a singular successor. Durie, 12th July 1628, Bennet ^{will of the} *contra* Turnbull. ----- A tack set for a certain tack-duty yearly, and to ^{contracters?} endure till the tacksman was paid of a sum lent to the setter, and the tack-duty allowed to the tacksman for the interest of his money, was not found good against a singular successor, as having neither ^{if} nor duty. Durie, 5th March 1629, Ld. Ley *contra* Kirkwood. ---- The like. Haddington, March 1612 *contra* . Haddington, March 1614, Rolloch *contra* . Durie, 13th July 1621, Ld. Muchal *contra* Tenants. Hope, (*Tack*) 1st December 1621, Parton *contra* Tenants. Newbyth, 16th June 1665, Dobie *contra* Stevenson. Gilmour, June 1666, *inter eosdem*. ---- The like in a tack of teinds. Stair, Gosford, 8th July 1673, Montgomery *contra* Parishioners of Kirkmichael. Fountainhall, 13th November 1679, Seton *contra* White. ---- A tack set for seven years, bearing a small tack-duty, with power to the tacksman to retain the rest of the tack-duty in lieu of the annualrent of a sum indebted to him by the setter, with a clause, That he should not be removed till the said sum were paid; this tack was found good against a singular successor by apprising during the seven years, but not that clause, that the tacksman should not be removed till the money were paid, which was only found personal and good against the setter. Stair, Gilmour, 15th June 1664, Thomson *contra* Reid. Gosford, 20th, Stair, 27th, June, 1674, Peacock *contra* Lauder.

FOUND, That a tack of lands set, *with woods*, gives the tacksman ^{If the tack-} only power to cut for repairing or building of houses upon the ground, ^{man has right} but not to cut for sale, or otherwise to dispose upon it. Gilmour, 16th ^{to woods,} June 1664, Ld. Touch *contra* Fergusson. --- A tacksman *qua* such has ^{mines, &c.} no right to any mineral under the surface, whether coal, lime-stone, clay, &c. which remains with the heretor, and he may use the same, by breaking the ground, satisfying only the tenant for his damage; upon which footing a pipe-maker having got an exclusive privilege from the heretor to dig clay, was preferred to one who had got such a privilege from the tenant. Stair, 15th February 1668, Colquhoun *contra* Watson.

He who is rentalled a tacksman, or kindly tenant in the King's property, has power to warn and remove, altho' it be not exprest in the rental. Colvil, July 1583, Home *contra* Home. --- An assigney ^{If a tacksman} to a liferent-tack was found to have power to out-put and in-put tenants, ^{has power to} altho' the same was not exprest in the tack. Colvil, February ^{out-put and} 1586, Kincraig *contra* Tenants. --- Found, That a liferent tacksman ^{in-put tenants?} may remove tenants, altho' it was not contained in his tack. Haddington, 13th January 1594, Stewart *contra* his Tenants. --- Power to remove tenants implied in a tack, tho' not exprest. Durie, 12th, Spottiswood, (*Tack*) 13th March 1629, Ld. Gallashiels *contra* Ld. M'Kerstone.

Tacksman
must enter to
possess, and
stock the
ground.

A TACKSMAN having taken a tack, and not entring to the land, the Lords sustained action against him a few weeks after the term of entry (altho' the first term of payment was not come) to cause him to enter to the occupying and labouring the room, that thereby the same being plenished with goods and corns, the ground might be more answerable to the master for the tack-duty. Durie, Haddington, *penult.* February 1623, Ld. Randifurd *contra* his tenants.

Must labour
according to
use and wont.

A TENANT being pursued for tilling the grafs, and riving out the ground that should be in pasture, and burning the moss after he was warned to remove; pleaded, That he was not restricted by any paction, and might labour the land as he pleased; which was repelled, and action of damages sustained, and a commission granted for cognoscing the same. Durie, 6th February 1633, Ld. Haddo *contra* Johnston. — The Lords sustained action for damage, and to desist at the instance of a master against his tenant, for over-liming the land, so that it would be useless at the ish of the tack. Gilmour, February 1665, Murray *contra* Balcanquhel.

Must uphold
the houses.

FOUND, That, by the nature of the contract of location, tenants are obliged to leave the houses in as good a condition as they get them, and to uphold them during their stay, unless a contrary paction be proved. Fountainhall, 20th December 1707, White's tenants *contra* Houston. — Tenants having meliorated some houses, and suffered others to decay, and so craving compensation of the one with the other; the Lords found, That whatever reparations a country tenant makes upon the houses (if habitable) for his own easier dwelling and accommodation, he can claim nothing upon that account, and, tho' the master was obliged to him, yet he cannot retain his rent upon that pretence, neither can he demolish, or take them away, which is allowed to one who builds on another man's ground, but not to tenants. Fountainhall, *Ibid.*

Subtenant
directly liable
to the master
for the rent.

THE fetter is preferable for his tack-duty, to every creditor of the principal tacksman, arresting in the subtenant's hands, and has direct action against the subtenant, unless where payment is made *bona fide* before; this was found in a subtenant of the customs of Edinburgh, and obtains *multo magis* in the case of lands, where there is a tacite hypothec. Stair, 31st January 1665, Anderson *contra* Town of Edinburgh. — Compensation upon a debt due by the tacksman to his subtenant, was found competent to be proponed against the master, compensation being payment in law. Gilmour, 13th February 1664, Hodge *contra* Brown.

Assigney to a
tack, liable for
the tack-duty.

A TENANT having assigned his tack, and after assignation having granted a subtack with the assigney's consent, bearing the tack-duty to be payable to the assigney; the Lords found the assigney liable for the rent, tho' he had never received any from the subtenant, upon this *medium*, that the subtenant's possession was his possession. Stair, 24th November 1674, Paton *contra* Couston. — An assigney to a tack is personally liable to pay the bygone tack-duties due by his cedent, which was found upon the general principal of mutual contracts, that the tacksman or his assigney, cannot take the benefit of the contract with-
out

out performing on their part. Durie, 8th July 1626, Turnbull *contra* Scot.

A TACKSMAN *vergens ad inopiam*, and not paying his duty; may be decerned to find caution, altho' he be not so bound by his tack. ^{In what cases must the tenant find caution for the rent?} Haddington, 22d June 1594, Ld. Kinnaber *contra* Ranye. — A tenant was decerned to find caution for payment of his rent yearly, in time coming, or else to remove, altho' he had been only resting a year's duty preceeding the summons, and it was not libelled, that the ground was unplenished. Durie, 27th February 1627, Lawfon *contra* Scot. — A Tacksman being so poor, that his master was yearly constrained to furnish him money to buy seed, &c. and the subject of the tack being considerable, action was sustained against him to find caution or remove, altho' there was not a full year's duty unpaid of the tack, and altho' the ground was laboured and plenished. Durie, 25th July 1629, Stevenfon *contra* Job. — A man and his wife, having set a tack to another and his wife; and after the decease of both the husbands, the fether's relict pursuing the other for a term's duty owing, and to find caution in time coming, or to remove, as use is; the Lords sustained the action, altho' there was not yet a whole year owing, but only one term preceeding the summons, and altho' it was offered presently to be paid, in respect the pursuer was a mean woman, and had no more to live on, and the defender, altho' tackswoman with her husband, yet had not subscribed the tack, so that she might either labour the land or leave it waste as she pleased; whereby the pursuer might be disappointed. Durie, 10th July 1632, Fisher *contra* Turnbull. — Tho' a defender was at the horn, and his escheat taken, and so manifestly *vergens ad inopiam*; the Lords would not allow him to be removed, unless he had been owing bygone tack-duties. Stair, Gosford, 2d January 1667, Earl of Murray *contra* Home. — A process against a tenant, to find caution for the mails and duties, or else to remove, was not sustained, unless two terms of the tack-duty were resting unpaid. Stair, 3d January 1672, Lady Binning *contra* Sinclair. — A tacksman of land, within burgh, may be removed, if he be behind in payment of his duty, unless he find caution for the future, in the same manner as a tacksman of land in the country. Dirleton, 16th January 1677, Cuninghame *contra* Halyburton. — This action to find caution or remove, was sustained against a tenant having neither rental nor written tack. Durie, 23d February 1622, Carnegie *contra* his Tenant. — But afterwards refused, because, being an extraordinary remedy, it ought not to be granted where the heretor has an ordinary remedy at hand, by removing the tenant upon a warning. Durie, 16th December 1628, Straerly *contra* Lundie.

ACTION sustained at the instance of a tacksman for the rent of lands, against a person who had thereafter acquired another tack from the same heretor, altho' the first tacksman had left his possession, and the lands had been possessed by the heretor for five years before the granting of the second tack. Durie, 7th February 1628, Ld. Balveny *contra* Ld. Innes. — A tenant having deserted his possession at Whitsunday, but at harvest having offered payment of all his arrears under form of instrument, and required liberty to cut down the corns; the Lords found the master who refused the offer, and caused reap and inbring them himself, liable in a spuilzie. Bruce, 14th June 1715, Downie

Downie *contra* Graham. --- A tenant who had a tack for many years to run, becoming bankrupt, deserted his possession and left the country, the master thereupon apprehended possession *brevi manu*, without using any legal order; the tenant returning before expiration of the tack, insisted in an action against her master for repossession, contending, That the tack was still a subsisting deed, since the master had never insisted in a declarator of any of the irritancies incurred by forsaking the possession, and neglecting to pay the tack-duty. Answered, *Unumquodque dissolvitur eodem modo quo colligatum fuit*, the pursuer by deserting her possession had shown her *animus* of throwing up the tack, the defender showed the same *animus* by apprehending the possession. The Lords found, That the pursuer's relinquishing the possession, and not claiming the same for several years, is relevant to exclude her from being repossessed. 28th November 1728, Elizabeth Taylor *contra* Sir William Maxwell of Springkell.

If the tackf-
man is bound
to produce his
tack in his ma-
ster's court?

ALTHO', according to the *regiam majestatem*, a superior might oblige his vassal to produce his evidents before his own court, which if he refused to do, being thereto called at four several court-days, the superior might declare the vassal's title null; yet even when that law took place, it was never extended to tenants tacks, as being penal; and therefore such a decret given by a master against a tenant, who at four several courts had refused to show his tack, was declared null. Maitland, 25th December 1670, Borthwick *contra* Lord St. John.

Tacite Relocation.

Who has the
benefit?

No tacite relocation was found to be presumed where the tenant was not in the natural possession. Colvil, June 1580, Earl Morton *contra* Scot. --- A tackfman of teinds found to have no title to pursue intrumetters after his tack was expired, and that he had not the benefit of tacite relocation. Durie, 12th December 1621, Ld. Lagg *contra* Parishioners of Linton. --- Found, That the tackfman of the teinds or feu-duties of other mens lands has the benefit of tacite relocation, as well as a tenant who is in the natural possession. Dalrymple, 1st February 1705, Creditors of Dunfermline *contra* Officers of state.

Has place e-
ven *resoluto*
jure dantis.

A TACK of teinds set by a beneficed person, was found a good right to the tackfman *per tacitam relocationem*, till he was interrupted, even for years, in which the beneficed person could not validly set; as a liferenter's tack would be valid against the fiar *per tacitam relocationem* after her death. Stair, 16th January 1663, Earl of Errol *contra* Parishioners of Urie. --- The like, with regard to a tack after the ward is fallen; for, tho' a tack is not good against the ward, yet, if the superior allow the tackfman to continue in possession, he must continue at his former rent. Durie, 13th March 1627, Lady Ley *contra* Bar.

Interruption
of tacite relo-
cation.

A PURSUIT for paying in time coming a greater duty than before, was found to interrupt a tacite relocation after expiring of a tack. Falconer, 6th March 1683, M'Brear *contra* Romes.

HE

HE who is in possession of lands by a tack, being pursued for a greater duty, if he except *super tacita relocatione*, and it be replied, That his possession was interrupted by warning, the reply will not be found relevant, if three years have expired after warning without intending removing thereon. Haddington, 6th July 1610, Bruce *contra* Bruce. — Inhibition of teinds found a sufficient interruption of tacite relocation, not only of the year in which it was served, but of all subsequent years whereof the titular received not payment. Durie, 18th March 1628, Lord Blantyre *contra* Parishioners of Bothwell. — A renunciation of a tack will not take off tacite relocation, if the tackfman thereafter continue to possess or intromet. Gosford, 19th November 1672, Bishop of Argyle *contra* Walker.

Tacite relocation revives, if the interruption be not followed out.

A POSSESSOR after he was warned to remove, and even after decreet of removing, having continued to sow the ground, it was found notwithstanding a spuilzie in the proprietor to meddle with the crop, tho' sowed *mala fide*; but as for what was sowed after he was dispossessed by letters of ejection, the Lords found these did belong to the proprietor, upon the principle, That *sata cedunt solo*. Stair, 22d February 1671, Gordon *contra* M'Culloch.

And even after interruption on the seed sowed belongs to the tenant.

Use of Payment.

VASSALS having been in use past memory of man, instead of their feu-duty in victual, to pay the fiars, viz. 20 shillings Scots or so *per boll*; this was not found to bar the superior from claiming the *ipsa corpora* in time coming. Fountainhall, 25th February 1696, Treasurer of Edinburgh *contra* Feuars. — A vassal who was bound by the *reddendo* of his charter, to pay yearly a certain quantity of capons and poultry, having, past memory of man, been in use and wont of paying no more but eight penies over head for the same, in a charge for the *ipsa corpora*, this converted price was found to be the rule for bygones, but not in time coming. 15th December 1737, Wallace *contra* Fergusson. — Use of payment of a lesser quantity of teind-bolls, tho' for 30 years, was found not to bar the minister, who was titular, from drawing *in futurum* according to the old rental. Durie, 3d July 1630, Symmor *contra* Ld. Balgillo. — Tenants in use to pay certain rental teind-bolls, are liable for the same, altho' exceeding the real teind of the corn produced, ay and while they make intimation to the titular, offering him the actual teinding of the corns. Durie, 22d March 1626, Lenox *contra* Tenants. — The like. Durie, 20th February 1633, College of Glasgow *contra* Stewart. — Use of payment to the minister who granted yearly discharges, mentioned to be for the whole teind-duty, was found to defend the heretor from any additional teind until citation or inhibition. Stair, Gosford, 19th January 1669, Earl of Athole *contra* Robertson. — The dues of a commissariat court, being in use to be uplifted by the clerk for the time, and the present commissary having insisted in a compt, reckoning and declarator against the clerk, for two thirds of all the profits and casualties of the court since the date of his commission, conform to the 25th article of the King's instructions to the commissaries; the Lords found the defender liable as to bygones preceeding the date of the decreet only, conform to use of

payment made to the pursuer and his predecessors in office for the space of 40 years; but liable to hold compt to the pursuer in time coming for two thirds of the profits and casualties due to the commissary by the King's instructions. Forbes, 4th December 1712, Horfeburgh *contra* Cranstons. — In a spuilzie of teinds against fishers, the Lords repelled an alledgeance made by them of continual use of payment of a particular duty condescended on of all preceeding years; because they were never tacksmen, nor had any right made to them of the teinds libelled for payment of the alledged duty, whereby, after the right expired, they might have bruiked for the same duty by tacite relocation. Durie, 4th December 1632, Drummond *contra* Fishers of Newhaven.

PAYMENT of a different species of victual than that mentioned in the tack of teinds, does not destroy nor innovate the tack, nor oblige the tacksmen to continue to pay disconform to the tack. Durie, 10th June 1630, Viscount of Stormont *contra* Hunter. — A tacksmen of the teinds of a whole parish having been in use to pay to the minister who set the tack more than the tack-duty; this use of payment was decerned to be continued *in futurum* during the years of the tack, which in so far was understood past from. Fountainhall, 8th, Stair, 9th November 1677, Rutherford *contra* Murray.

VOLUNTARY payment of teinds in a greater quantity than is truly due, was found neither to take away the right constituted by decret of valuation, nor to oblige beyond the time of the said voluntary payment. Gilmour, February 1662, Ld. Baffindean *contra* Bells. — In a process for teinds libelling the fifth part of the rent, the defenders produced a decret of valuation, against which the alledgeance was found relevant, That it was a deserted right, never having taken effect by payment, but tacks accepted by the defenders, and duties paid by them thereafter to a greater quantity. Stair, 15th July 1670. Biggar *contra* Cuninghame. — A minister insisting for a certain sum in money, and offering to prove *decennalem & triennalem possessionem*, tho' the decret of valuation carried only a certain number of bolls that were not *communibus annis* worth that sum; the Lords found it enough for the minister to prove seven years use of payment in money, to make the heretor liable in bygones till the valuation in a declarator were made the rule in time coming. Fountainhall, 7th July 1697, Malcolm *contra* Irvine.

IN a process betwixt a minister in the west and an heretor, touching the measure of his stipend victual, the Lords found, That tho' the acts of parliament did make the Linlithgow measure the rule of commerce, yet seeing they had in these western parishes a larger measure therefore the minister was to receive his stipend by the local measure of that part, reserving to the heretor to redress himself before the commission. Fountainhall, 26th June 1688, Littlejohn *contra* Montgomery.

AN heretor who was in use to pay to the titular a silver duty in name of teind *in cumulo* for his whole estate, brought an action against his predecessor's relict, who had a liferent locality of a part of the lands, as intrometter with the teinds of that part; and the question occurred, whether she was liable to him for the true worth and value of the teinds, or only for a proportion of the silver duty paid by him to the titular: It was pleaded for the pursuer, That he being in possession of the

the teinds by tacite relocation, and paying a certain duty to the titular, in place of the *ipsa corpora*; this was a separate subject which was not disposed to the liferentrix, and to which therefore she could pretend no right more than if there were a current tack in the pursuer's person. It was answered, That there is a very wide difference betwixt tacite relocation and a standing tack; the last is personal whoever be the proprietor; tacite relocation follows the property, and must do so from the very nature of the thing, because it is truly no right or title to the teinds, as a tack is, upon which a claim may be founded for the teind; it is no more but a restriction or limitation upon the titular, in virtue of which the proprietor, who was liable to pay the teind *ipsa corpora*, can free himself by paying the usual silver-duty in place of it: The defender therefore, who is proprietor of the lands for life, must of course have the benefit of the tacite relocation; and the pursuer, who is not titular of the teinds, nor has any other right in his person to the teinds, can insist in no other shape than as *negotiorum gestor* for the silver-duty he paid to the titular upon her account, and which she was bound to pay by tacite relocation in place of the *ipsa corpora*. The Lords found the defender no further liable than for what the pursuer instructs he actually paid to the titular upon account of the liferent lands. 19th July 1733, Sir William Ker of Greenhead *contra* Hog of Marcus.

Inhibition of Teinds.

IT was found a good defence against an inhibition of teinds, for one year, That a part of the crop was led before it was executed. Stair, Gosford, 10th June 1673, Lady Strathnaver *contra* Renton.

INHIBITION at the kirk-door, tho' not executed personally, nor at the dwelling-house of the heretor, who bruiks *per tacitam relocationem*, was found sufficient to infer a spuilzie of teinds, altho' the tacksmen dwelt not within the parish. Gosford, 18th February 1670, Ker *contra* Douglas. — Where an inhibition of teinds was only, in general, against all and sundry, but neither executed personally, nor at any man's dwelling-house; the Lords refused to sustain the same, to interrupt *bona fide* possession, in consequence of a right to the teinds in question, obtained *a non domino*, or to make the party a *mala fide* possessor, tho' it may be sufficient to interrupt tacite relocation. Fountainhall, 17th January 1696, Anderson *contra* Forbes.

VERBAL tack how far effectual? See Locus pœnitentiæ.

IRRITANCIES in tacks. See Irritancy.

IF a tacksmen can sublet or assign? See Personal and Transmissible.

IF tacks or rentals go to heirs? Ibid.

WHAT hazards the tacksmen runs? See Periculum.

TACK if good against recognition, forfeiture, Ward, &c. See under these several heads.

TENANT paying his rent before hand. See *Payment before Hand*.

TACK-DUTY taken payable to a creditor. See *Competition*.

IF the tenant's consent to remove will supply warning. See *Removing*.

T A I L Z I E.

Tailzie
when revo-
cable?

THE Lords found, That altho' a simple tailzie, not depending upon any onerous preceeding cause, was alterable by the maker, as being *donatio mortis causa*; yet that a mutual tailzie, done by way of contract, is not revocable by repentance of any of the contracters, without mutual consent; and found, That such contracts were not unlawful, as *pacta de successione viventis*, seeing such pactions, by our law, are valid, neither was such a contract found to be *nudum pactum*, but a complete security, obligatory on both parties; lastly, That such mutual contracts of tailzie were not *contractus innominati*, these sorts of securities not being known in this kingdom; nor did they find the doing of deeds by either party, which were contrary to the said contract, did loose the tailzie therein contained, but that, notwithstanding thereof, the contract stood effectual. Durie, Spotiswood, (*Tailzie*) 14th January 1631, Sharp *contra* Sharp. — In the same action the Lords found, 'That tho' neither party could break the tailzie without the other's consent, yet that the contracters might sell and dispose on the lands at their pleasure, notwithstanding the contract, which does not prejudice the parties in any liberties they had before the same, excepting only concerning the succession to their right; and, if there be nothing to succeed to, there can be nothing sought by them; and altho' thereby the force of the contract might seem to be elidable, by making alienations in favours of a stranger to the behoof of another successor; yet, if such fraud were intended, it was in law repairable. Durie, Spotiswood, (*Tailzie*) *Ibid*. Durie, Spotiswood, (*Tailzie*) 4th March 1634, Home *contra* Homes. — In a competition betwixt an heir-male and an heir of line, an old tailzie being produced by the former, bearing, That the estate had always been conveyed to heirs-male; therefore the granter obliges himself to his father to provide the same, in like manner, to his heirs-male, &c. the Lords found this tailzie onerous, and so not revocable. Fountainhall, 31st December 1695, Innes *contra* Innes. — A party having, without an antecedent onerous cause, tailzied his estate, with the usual prohibitory and irritant clauses, to himself in liferent, and to his father in fee; and failing of him, by decease, to the heirs-male, lawfully to be begot of his own body; and failing these, to other heirs of entail. The said tailzie while it remained in the terms of a personal right, not perfected by charter and sasine, especially being in favours of heirs to be begotten, was found revocable by the maker thereof, with consent of his father, the first institute. Forbes, 23d June 1713, Scot *contra* Scot. — A father and a son, who were both infest, having jointly tailzied the estate in the son's contract of

of marriage, with clauses irritant and resolute, with this provision, That the father and son jointly should have power to alter; it was found, That, after the father's decease, the son could not alter the tailzie, tho' infestment followed, only it was registred in the register of tailzies, and even altho' the substitution had been gratuitous. Bruce, 15th July 1715, Schaw and her husband *contra* Schaw.

AN heirefs having dispoſed the lands to her children, which failing, to her brother, with this condition, " That if he ſhould ſucceed by " virtue of that diſpoſition, he ſhould pay ſuch a ſum to her husband's " neice ; " and ſhe having died without children, and her brother intrometting with the rents, being purſued for the legacy, but offering to ſerve heir of line, without noticing the diſpoſition; the Lords found, That he might totally abſtain, but if he meddled with the heretage, he could not repudiate the burdens laid on it by the proprietary; and therefore found him liable in payment of the purſuer's legacy. Fountainhall, 29th December 1711, Forbes, 22d February 1712, Turnbull *contra* Kinnier. — The Counteſs of Sutherland executed a diſpoſition of entail, with prohibitory and irritant clauses, upon contracting of debt, and upon giving away, dilapidating, or impignoring the lands; and a clause diſpenſing with the not delivery, which was found amongſt her writs, after her death, without any infestment upon it; the inſtitute Archibald Earl of Forfar, who, at the ſame time, was heir at law, neglecting the entail, ſerved himſelf heir at law, and contracted conſiderable debts upon the eſtate: The next ſubſtitute in the entail, making up titles, brought an action againſt the deſunct's inſtitute's heir of line, to diſburden the tailzied lands of the debts; the Lords found, That the heirs of tailzie could not alter the order of ſucceſſion therein ſet down; and, that the Earl of Forfar, infeſt as the Counteſs her heir of line, was obliged to have reſigned in terms of the tailzie; and that his heir is thereby obliged to diſburden the ſaid Counteſs her tailzied eſtate, and to relieve her heirs of tailzie of the debts of the family of Forfar. Home, 2d February 1728, Lord Strathnaver *contra* Duke of Douglas.

CLAUSES in a tailzie, prohibiting the contracting of debts, and irritating the contraveener's right, are effectual againſt creditors. Stair, 26th February 1662, Viſcount of Stormont *contra* Creditors of Earl Annandale.

Reſolute and irritant clauses good againſt ſingular ſucceſſors.

A TAILZIE of lands being made by a father to his daughters *ſucceſſive*, upon condition, That if the eldeſt did not marry one who ſhould aſſume the name of the family, the next ſhould ſucceed; the eldeſt failing to do ſo, it was found, That the next might ſerve herſelf heir of tailzie, tho' there was no clause irritant. Goſford, 26th July 1677, Stevenſon *contra* Stevenſon. — Found, That a prohibitory clause, contained in a tailzie, was a ſufficient ground for the next heir to reduce on the act of parl. 1621, any poſterior, gratuitous, or voluntary deeds, not depending on prior onerous cauſes, tho' it wanted a clause irritant; for an irritant clause would reſolve, irritate, annul and reduce even the debts of onerous creditors. Home, November 1686. Fountainhall, 27th and 28th January 1687, Earl Callendar *contra* Lord John Hamilton. — There being a tailzie in a contract of marriage,

Effect of prohibitory clauses.

marriage, where the clause *de non alienando*, was only prohibitory, and wanting the resolute irritant clause, and the party and his son, who was the first branch of the tailzie, having entred into a minute of sale of the lands, for the onerous and necessary cause of payment of debts; the Lords found, That the father and the son might warrantably sell, they instructing a just and necessary cause for such an alienation, notwithstanding the prohibitory clause in the contract of marriage. Dalrymple, Forbes, 7th, Fountainhall, 12th December 1705, Young *contra* Bothwell.

Effect of
clauses irritat-
ing the debts
contracted but
not the contra-
veener's right.

A TAILZIE being framed with a clause prohibitory, declaring, That it should not be lawful for any of the succeeding heirs to do any deed that might frustrate the tailzie, or course of succession; or, if they did, the same should be void and reducible at the instance of the next heir. The first heir having contracted debt, and his representatives, who were pursued for the same, founding their defence upon the said clause; the Lords found, That the tailzie could not effectually bind up the first heir from contracting debts, notwithstanding of the provision, That deeds of contravention should be null, in respect the right of the contraveener was not also provided to become void by the acts of contravention; and therefore found his heirs liable for the same. Fountainhall, Dalrymple, Forbes, 11th March 1707, Heiress of Reidheugh *contra* Forsyth. --- An eldest brother having tailzied his lands to the heirs of his body, which failing, to his next brother *nominatim*, and his heirs-male, and so on to other three brothers; which all failing to his own daughter, with a clause prohibitory of contracting debts, declaring such deeds void: The grantee dying without heirs-male of his body, and the second succeeding, the Lords, in the ranking of the creditors of the two brothers, found, That in regard the tailzie contained no irritancy of the contraveener's own right by alienation, or contracting of debts, therefore the second brother's debts did equally affect the estate with the debts of the eldest, according to the priority of their diligence. Fountainhall, 13th June, Forbes, 22d July 1712, Creditors of Riccartoun competing.

Effect of
clauses irritat-
ing the contra-
veener's right,
but not the
debts con-
tracted.

A TAILZIE recorded in the register of tailzies, contains the following clause, "And 'tis hereby provided, That my heirs of tailzie above designed shall not sell, dispone, or alienate my said lands or estate in whole or in part, nor shall they contract or take on debts or sums of money, nor do no other deeds whatsoever in prejudice of the foresaid tailzie, or whereby my lands or estate, or any part thereof may be evicted, or that may prejudice the next heir in his succession, otherwise it is hereby specially provided, That the contraveener shall amit and lose his right to my lands and estate, and it shall be leifom to the next heir to serve himself heir of tailzie, and and to obtain himself infest sicklike as if the contraveener were naturally dead." A personal creditor to one of the heirs of entail, insisting for payment against the next substitute after his debtor's death, it was objected, That the tailzie contained a forfeiture upon the contracting of debt, and if the debtor was forfeit, the creditor could not have access to the estate. It was answered, That the forfeiture of the heir's right does not necessarily imply a forfeiture of the debt; and therefore, because tailzies are strictly to be interpreted, there behoved to be

a special

a special provision to that effect; for instance, where it is provided by a tailzie, under the penalty of forfeiture, that the heir shall use a certain surname and arms, a forfeiture upon this clause to be sure could not dis-appoint anterior debts lawfully contracted; and 'tis probable that the maker of the entail was satisfied with this penalty of forfeiture, as a sufficient check against their contracting of debt, not willing to go the whole length of forfeiting also the debt. 'Twas added, That the statute 1685, in order to make tailzies effectual against lawful creditors, seems to require, that there should be a clause declaring the debt to be null and void, and that, upon the contravention, the heir may pursue a declarator of irritancy, and serve himself heir to the person last infeft before the contraveener. The Lords found the pursuer's debt effectual against the estate. 11th July 1734, Mr. James Baillie *contra* Carmichael of Maulsley.

A GENTLEMAN having made an entail of his estate, with resolu-
lutive and irritant clauses, among others, directed against changing the
order of succession, and having thereafter purchased another estate, Limitations
effectual, tho'
established on-
ly by way of
reference. which he took to himself in liferent, and his second son, and the heirs-
male of his body in fee, &c. which failing to the heirs contained in his
former entail, "and under the provisions, limitations and conditions
"contained in the said former entail;" the Lords found, That the
said second son and his heirs-male, could not gratuitously alter the or-
der of succession, and that the prohibitory and irritant clauses contain-
ed in the first entail, took place in the second, by virtue of the gene-
ral reference. Forbes, 5th February 1713, Sir Alexander Don of New-
ton *contra* Don.

A TAILZIER having given full power to his heir of tailzie to sell
or affect certain lands named, for payment of his debts, the heir was
found sufficiently impowered to sell these lands, tho' the price confide-
rably exceeded the debts. Power to sell
tailzied lands
for payment of
the entailers
debt. Gosford, 19th January, Stair, 3d February
1669, Kilbirny *contra* Heirs of tailzie of Kilbirny.

CONTRACTING of personal debt alone, where the same is not
made real upon the estate by diligence, is no deed of contravention to
irritate the heir's right, tho' the entail contain irritant and resolute
clauses *de non contrahendo debitum*. Home, 18th July 1722, Scot of
Galla *contra* Creditors of Galla. — A general clause in a tailzie, pro-
hibiting the heirs of entail to sell, annalzie, alienate, wadset or dispone
the lands, &c. under irritancies, is not understood to restrain them from
selling for payment of the tailzier's debts. February 1730, Earl
of Lauderdale *contra* Heirs of entail. — An heir of an estate entail-
ed, with strict prohibitory and irritant clauses, having granted liferent-
provision in favours of his wife, the same was challenged by the suc-
ceeding heir of entail, as excluded by the prohibitive clause *de non ali-
enando*; the Lords found the provision was comprehended under the
prohibitive clause, but sustained the same in so far as it could be sup-
ported by the terce, which being the provision of law, is never under-
stood to be excluded. Home, 27th December 1726, Cant *contra*
Borthwick of Crookston. — In a strict entail, one of the limitations
being, That the fiar should not provide his wife in jointure exceeding
a third of the free rent, the free rent was understood with relation

to real incumbrances only ; and it was found, That personal debts could not be brought *in computo* to restrict the jointure. Fountainhall, 25th January 1698, Lady Lee *contra* Ld. of Lee. — An heir of entail, with strict prohibitory and irritant clauses, *de non alienando & non contrahendo debitum*, cannot grant bonds of provision to his younger children, so as to affect the estate after his decease: He can indeed grant a jointure to his wife, equivalent to the legal third, but there is no consequence from that, because the one is a deed of the law, the other of the fiat ; and the irritancies and prohibitions of tailzies *de non alienando & non contrahendo debitum*, are directed only against the last not against the first.

February 1730, Borthwick *contra* Borthwick. — An entail containing strict prohibitory and irritant clauses with regard to the contracting of debt, but no prohibition to alter the order of succession, was found notwithstanding to imply such a prohibition. Home, 2d February 1728, Lord Strathnaver *contra* Duke of Douglas. — By a deed of entail made in the year 1711, the heirs of entail are put under a prohibition of altering and alienating, and of contracting debt, *and of doing other deeds of omission and commission*, either civil or criminal, whereby the lands may be evicted, &c. and to this there is added a strict irritant clause, and there is this second irritant clause, " That if any apprising, adjudication or other diligence " should be led against the estate for sums contracted, or to be contracted by the maker, the heir of tailzie shall be obliged to purge " the same three years before expiry of the legal, or at least within six " months after their succession, under the pain of irritating the right." After the tailzier's decease, the annuity contracted by him with his lady being allowed to run in arrear, the question occurred, whether an adjudication led by her for payment of her arrears, did infer an irritancy against the heir, notwithstanding it was purged in terms of the last clause, three years before expiry of the legal. The question occurred in a declarator of irritancy at the instance of a substitute against the heir in possession ; and it was pleaded for the pursuer, That allowing the adjudication to pass, tho' upon the tailzier's obligation, yet for annuities arising due during the heir's possession, was a deed of omission that fell under the first irritant clause, and which was not purgeable. Answered, The first clause relates only to debts and deeds of the heirs of entail, with regard to the tailzier's debts, the payment of these is provided for in the second clause, and a just and proper difference is made betwixt them ; the annuity due to the relict was a debt of the tailzier's, tho' arising due after his decease, equally with the annual-rents of a personal bond granted by him. The Lords found the irritancy not incurred. 12th July 1738, Denham *contra* Denham of Westshiels.

Heir of entail contra-veining, does his forfeiture take place also with regard to his descendants ?

A CLAUSE irritant, bearing, That the first member contraveining, the fee should devolve on the next substitute, which is commonly construed to be the next branch ; and therefore the question being, whether not only the contraveiner himself but his posterity should forfeit ; the Lords found the heirs of the contraveiner's body not excluded, seeing the exception of the tailzie did not expressly bear, that he should amit and tine the right of succession not only for himself, but also for all descended of him. Fountainhall, 6th January 1697, Symson and Home *contra* Earl of Home.

LANDS

LANDS being tailzied to the younger children of a Nobleman, with this irritancy, That if any succeeding to the said lands should come also to succeed to their paternal honours and estate, the tailzie should devolve on the next, and the second brother after succeeding to the said lands taking upon him the dignity upon decease of the eldest, which was a contravention; in this case the Lords determined, That he had not only forfeited with respect to his right as first member of the tailzie, but, having contravened, he could not come in as heir to the third brother who was next substitute, because, being once secluded *ex proprio facto*, he could never make his right convalesce. Fountainhall, 6th January 1697, Symson and Home *contra* Earl of Home.

An heir of entail forfeiting, if he can be admitted afterwards, claiming upon a separate ground?

THE Lords found, That the next heir of a tailzie had a sufficient interest to crave that it might be registred, and that judicial transumps were not enough. Fountainhall, 11th January 1704, Gordon *contra* Campbell.—A substitute in a tailzie may insist against the granter for exhibition thereof, but reserving all defences against registration, or to any other legal effect, as accords. Bruce, 25th January 1715, Houston younger *contra* Sir John Schaw. — A remote substitute may pursue contravention of a tailzie, where the nearer heir lies by and neglects his right. Fountainhall, 6th January 1697, Symson and Home *contra* Earl of Home. — The like. January 1723, Irvine *contra* Irvine.

Any substitute may insist for exhibition of the entail, contravention, &c.

AN heir of entail having burdened the entailed estate with debt contrary to the provisions of the tailzie; his representatives, in a separate estate, being pursued by the next substitute in the entail, were found liable for reparation and damages, which landed in disburdening the estate of the debts laid upon it, contrary to the provisions of the entail. Home, 2d February 1728, Lord Strathnaver *contra* Duke of Douglas.

Acts of contravention subject the heir of entail to damage and interest?

A MAN's tenement being tailzied to another, failing heirs of his own body, and after an accidental fire, the present fiar having, not only repaired it, but made such meliorations as stood a much greater sum than the mere repairing would have cost; in a declarator at the fiar's instance, against the said other person to whom the subject was tailzied, to have it declared, That the tenement should stand affected with the said expence, in case the pursuer should decease without heirs of his own body; the Lords found, That the fee must be affected with these meliorations. Fountainhall, 22d February 1706, Temple *contra* Gairns.

Improvements made upon the entailed estate.

WHERE heirs and assignies are exprest in the last termination of a tailzie, when the succession devolves to them, after the heirs of entail, specially called, are exhausted, the limitations, irritant and resolute clauses. &c. are at an end, and the fee that was before tailzied becomes simple; for, as the adjection of assignies imports an unlimited power of disposal and alienation, so the clause, *Which failing, to the granter himself, his heirs and assignies*, naturally imports a return of the estate to the lineal succession in the same shape it was before making the entail. Fountainhall, 15th, Forbes, 29th December 1710, Leslie *contra* Dick and Leslie.

Tailzied fee becomes simple, when it terminates upon heirs and assignies.

Decisions upon act 22. Parl. 1685.

The act has
no retrospect.

THE act 1685, anent tailzies, has no retrospect, and therefore regulates not the *constitution* of tailzies made *before* the act, so that such a tailzie needs not be recorded. Home, 27th December 1726, Cant *contra* Borthwick. — But it regulates all *posterior conveyances*, whether the tailzies were made before, or after the act. Home, 28th July 1725, Viscount Garnock *contra* Master of Garnock.

If any other
than the tail-
zie of a land
estate has the
privilege of
the act?

A TAILZIE of a house within burgh being presented to be registered, the Lords did not think that the act of parl. 1685, did extend to such mean subjects of property, but was to secure land-estates in the country from going out of the family, however their Lordships allowed it to be registered in common form & *periculo petentis*. Fountainhall, 24th February 1710, Doctor Pitcairn suppliant.

Tailzie good
against heirs,
without regi-
stration.

TAILZIES good against heirs without registration. Home, 26th February 1724, Willison *contra* Callendar of Doratar. — But not good against creditors. Home, 8th December 1724, Competition Willison with the Creditors of Doratar. February 1726, Hall *contra* Caffie.

General re-
ference of
clauses in tail-
zies.

A GENERAL reference in the *saftine* of an heir of tailzie to the irritancies contained in the original writs, is not sufficient to interpel creditors in the terms of the act 1685, but these irritancies must be repeated *verbatim*. Home, 28th July 1725, Viscount of Garnock *contra* Master of Garnock. — The provisions and irritant clauses by the act 1685, must be repeated in every conveyance of the tailzie, even in a general retour, if that is the title of the heir's possession. Home, 1st February 1726, Stewart *contra* Denham.

Tailzie must
be recorded, o-
therwise not
effectual a-
gainst credi-
tors.

THE act 1685 was introduced for the security of creditors as well as for the security of entails: And therefore a declarator of irritancy having been obtained against an heir of entail, who possessed the estate upon a general service, for neglecting to insert in the retour the limitations of the disposition of entail, with which he connected by the service; his debts were found good against the next heir, the tailzie not being recorded in the terms of the act 1685, which they would not have been at common law, in respect of the provisions in the right itself, which was sufficiently qualified thereby, at least while it stood as a personal right without infestment: And it was found, That the estate might be affected for these debts, tho', by declarator of irritancy, the same was established in the person of the heir, who did not represent the defunct debtor, and so the estate was now neither in the debtor's person, nor in *hereditate jacente* of him; which the Lords did not regard, because, as to the creditors, the case was the same in virtue of the act 1685, as if the debtor had been absolute proprietor. 23d November 1731, Baillie *contra* Stewart.

HEIR of entail how far he represents the defunct? See Representation.

IRRITANCY effectual without declarator. See Irritancy.

TEINDS.

T E I N D S.

TEIND is not *debitum fundi*, and therefore the heretor is not ^{Not debitum fundi.} liable for the teinds intromitted with by his author preceeding his right. Stair, 20th February 1662, Earl of Callendar *contra* Monro.

AN heretor found liable to the titular for teinds, because he had set ^{But debitum fructuum.} the stock and teind promiscuously to his tenant, and received rent there-fore. Durie, 16th March 1627, Inglis *contra* Kirkwood.

TACKSMEN of teind-fish pursuing the merchants who bought them, for the teind thereof; their exception, That the takers were only liable, was repelled, and a reply upon the custom of payment, by the buyers and intrometters, was sustained. Durie, 15th February 1631, Tacksmen to the Bishop of the Isles *contra* Brown.—A churchman pursuing the buyers of salmon caught upon the coast of his district, for the teind thereof; it was found, That he could not burden the merchants with any such servitude and teind-duty, unless he proved, That he, or his authors, had been in possession of exacting and getting payment thereof. Fountainhall, 10th March 1685, Bishop of the Isles *contra* Merchants of Edinburgh.—Tho' the purchasers of corn or fish in the mercat would not be liable for the teind thereof, the buyers of a whole crop of corn, or fish new taken, are in a different case, seeing it must be consistent with their knowledge that the teind is not paid; and therefore a process for payment of the teind was sustained against a purchaser of herring, who purchased the same green, and salted them himself. Stair, 13th December 1664, Bishop of the Isles *contra* Hamilton.—These buyers were not found liable for the teind of fish, who bought the same from merchants in the mercat, and did neither take them themselves, nor bought them immediately when they were green from the taker. Stair, 20th December 1664, Reid *contra* Melvil.

THE Lords commissioners for teinds found, That the heretors of ^{What lands subject to per-sonage teind?} lands having right *cum decimis inclusis*, were not liable to the augmentations of ministers stipends, and that no locality could be given out of their teinds, the infeftments being before the year 1587; because the teinds, not being separated from the stock, and the heretors having right to the lands free of teinds, in effect there were no *decimæ*. Dirleton, 28th January 1675, Minister of Tulliallan *contra* Colvil.

THE Lords found, That the old privilege of the Cistercian order, of being exempted from paying teinds, was not altogether so personal to the monks, but that it ought to be extended to the Lords of erection of these lands. Gilmour, 1st July 1664, Crawford *contra* Ld. Preston-grange.—In a process of augmentation, a defence was made by one of the heretors, That his lands were teind free, in respect they did anciently belong to the abbay of Balmerino, a convent of the Cistercian order; and in the year 1539, were feued out to the defender's authors by the abbot and convent *cum decimis garbalibus earundem*; that the Cistercians were one of the four privileged orders by the law of Scotland, whose lands were teind free, and that the defender, as deriving right from them while this privilege subsisted, was entitled to the same privilege; and for this Lord Stair was appealed to *lib. 4. Tit. 24. § 9.* and

Sir George M'Kenzie, Book 2. *Tit.* 10. § 7. Answered, 1mo, The Cisterrians had no privilege as to their teinds, except as to lands acquired before 1120, the date of Pope Innocent the third's canon, which excludes the privilege of the four orders as to *acquirenda*; and, tho' this will exclude the privilege entirely with regard to Scotland, where the Cisterrian order had no property for a century thereafter, it only shows the inaccuracy of our writers, who, in laying down the doctrine in general, have not adverted, that it would not apply to Scotland. 2do, The canon law, which introduced that privilege, makes it purely personal in favours of the Cisterrian monks, and not communicable to their singular successors; and this is Sir George M'Kenzie's opinion in his observations on the act of annexation 1587. The Lords repelled the defence founded on the charter produced for the defender. 15th June 1737, Minister of Barrie *contra* Gairden of Lawton.

FOUND, That templers, hospitallers, and monks, ought to pay no teinds for the lands they laboured or plenished themselves with their proper goods. Colvil, Nairne *contra* Drummond. — Nay it was found, without regard to this circumstance, That temple-lands, which had paid no teind for 50 years, were free *in futurum*. Hope, (*De decimis*) 3d February 1614, Lord Wigton *contra* Lady Carwood.

It was found relevant to free a peice of land from paying teind, That it had been mortified for a glebe, whether for a kirk or chappel, wherein there was divine worship, tho' it was not designed by process or course of law, but of consent. Stair, 9th June 1676, Burnet *contra* Gib. — In a pursuit for teinds, alledged the acres were of old a vicar's glebe, which, by the canon law, paid no teind. Answered, Altho' they were free in the vicar's possession, yet they cannot plead exemption in a laick's, and the 62 act parl. 1578, mentions not vicars glebes. The Lords sustained the alledgeance, unless the pursuer would prove they had paid teind within these 40 years. This would not hold in vicars lands, for they have no such privilege. Fountainhall, 16th July 1678, Earl Queensberry *contra* Douglas.

What subjects pay vicarage teind.

VICARAGE teind is *secundum consuetudinem loci*, which was found in the case of lambs. Stair, 11th February 1665, Scot *contra* Scot. — In a pursuit for the vicarage of some yards in Elgin, it was found a sufficient defence, That they never paid any, seeing the teind of lint and hens are only consuetudinary; and as for calves, wooll, milk, and lambs, none of these kinds were produced there. Stair, 30th June 1668, Minister of Elgin *contra* Parishoners. — Kail, herbs, and roots, are not teindable, unless ancient custom be alledged. Stair, Dirleton, 9th June 1676, Burnet *contra* Gib. Fountainhall, 27th November 1679, Burnet *contra* Gib. — Calves, lambs, and wooll, commonly pay vicarage in all places, and are not properly consuetudinary; and therefore as to these, cessation of payment, for however many years, does not create an exemption. Fountainhall, 24th July 1678, Ld. of Grant *contra* M'Intosh. — A minister having right to the teind-fish of the parish, and it being questioned, whether the right was to be limited to fishes imported, in order to consumption and serving the country; or if it was to be extended to such as were taken elsewhere, and coming here only to be cured and packed, in order to exportation abroad; the Lords found these last not liable to the minister in any teind. Fountainhall, 20th January 1708, Minister of North Leith *contra* Merchants

Merchants in Aberdeen. This observed also by Mr. Forbes, who adds this reason, That these fishes had already paid teind elsewhere.

THE Lords affoizied from a declarator, craving, That the party might only be liable for one of ten, and be free where there were only nine or fewer animals, which are indivisible; and found, That tho' there were but one animal, they were liable in the tenth part of the price thereof. Fountainhall, 11th January 1681, Drummond *contra* Dalrymple. See Haddington, 19th January 1611, Baillie of Munkland *contra* Tenants, where it was found, That if there be seven stirks or lambs, or above, under 10, the Tacksman will get one of teind. Vicarage
how exigible?

TEINDING of corns by casting the stacks was found a spuizie, and that it ought only to be on the ground. Colvil, March 1584, Crichton *contra* Ruthven. — A spuizie of teinds cannot be elided upon requisition made conform to the act of parliament, unless 15 days be past after the shearing of that haill sort of corn, which is sought to be teinded before the first requisition be made, and that there intervene seven days betwixt the first and second requisition, and thereafter that the teind being sighted by neighbours, it be stacked upon the ground and kept till hallowmas. Haddington, 19th January 1610, Hamilton *contra* Spence. — Found, That the act of parliament about leaving the teind on the ground, could not be extended from great teinds to vicarage. Fountainhall, 11th January 1681, Drummond *contra* Dalrymple. Method of
teinding.

FOUND, That a titular of tithes could claim the parsonage teinds of no more but what was laboured and tilled, and that he could not hinder the proprietary to turn the arable ground into grafs. Stair, Dirleton, 9th June 1676, Burnet *contra* Gib. Fountainhall, 21st January 1696, Bruce *contra* Arnot. Heretor not
bound to keep
his land in
tillage for the
benefit of the
titular of the
parsonage.

TEIND-FISH, and all other small fish are of their own nature reputed vicarage, and appertain to the vicar of the parish, unless some other prelate either shew a particular right, or else possession past memory of man. Haddington, 5th July 1610, Dickson *contra* Ld. Kincaid. — Teind-sheaves are of the law the patrimony of the parson of the parish; and if the vicar claim any part thereof, he must either prove it by mortification; or failing thereof, if he intend to supply it, *per decennalem possessionem*, he will not be allowed to prove such possession by naked witnesses, but must have some adjunct in writ, as tacks set by him, old rentals, inhibition, acquittance, decreet, or some other writ of that nature. Haddington, *penult.* January 1611, Ramsay *contra* Lord Roxburgh. — A minister who had gotten his stipend modified to him, when the teinds of the parish were under tack, was found entitled, *qua* parson of the parish, to insist against his heretors for their parsonage teinds after the tack was run out. Marcus, (*Ministers*) 4th December 1684, Minister of Stobo *contra* Parishioners. — *Decima debentur parochia*, is applicable to the vicarage as well as parsonage teinds, and a minister presented to the vicarage teinds, with a decreet conform, in general, was found to have a good title to pursue the particular heretors, without any further document to instruct that the vicarage was a part of the patrimony of that kirk, seeing they neither alledged a Decima de-
bentur parochia

right, nor that they had paid to any having a right, nor pretended a prescription of freedom. Stair, 14th January 1674, Johnston *contra* Stewart. See act 23, parl. 1690, act 25, parl. 1693, by which the right of teinds, not heretably disponed, is taken from the ministers, and established in the patron, always with the burden of a competent stipend, whereby the clergy in Scotland are now become altogether stipendiary.

Teind a distinct subject, and not understood to be comprehended under a right to lands.

Tho' teinds are distinct rights from lands, and not presumed to be conveyed unless expressed; yet they were found to be implied in a disposition, in so far as, *1mo*, the purchaser was assigned to the tenant's tack, who paid a joint duty both for stock and teind. *2do*, Was burdened with the minister's stipend. And, *3tio*, Gave more than 20 years purchase for the rental, comprehending both stock and teind. Stair, 27th February 1672, Scot *contra* Muirhead. ---- A relict claiming from the heir the teinds of her jointure lands, tho' not expressly provided to her, only, in the clause of her contract of marriage constituting her jointure, she is expressly burdened with the minister's stipend; the Lords found, That it had been the design of parties, that she should have the right of the teinds of her jointure-lands, tho' not expressly mentioned, in respect of the quality and burden imposed upon her by the clause of the right, obliging her to pay the minister's stipend. Fountainhall, 29th June 1698, Callendar *contra* Carruthers.

Valuation of teind. *1mo*, When parsonage and vicarage are united.

In an action of valuation of teinds at the heretors instance against the patron; it was insisted on for the patron, That the heretor having got a considerable grassum for a nine years tack of his lands, the ninth part of that grassum ought to be added to the yearly rent, in order to make out a valuation of the teind; but it was found, That in respect the old rent was kept up, and that grassums were not in use to be paid formerly for tacks of the pursuer's lands, therefore the grassum could not be taken into the calcul in ascertaining the valuation of the teinds. 2d December 1730, Baillie *contra* Duke of Douglas. — In the same process the patron likewise insisted, That here the tenants, by their tacks, being taken bound to pay annually the half of the land-tax, this payment ought likewise to be considered as increasing the value of the teind, since the fifth part of the gross rent, without deduction of publick burdens, is the rule, by act of parliament, for valuing tithes. To this it was opposed, That the quantity of the land-tax is uncertain, its endurance not absolutely certain, and therefore it has been the practice of the court not to augment the teind rental on account of the tenants paying the half or the whole of it. The Lords likewise repelled this alledgeance. *Ibid.* — In a valuation of teind, the following particulars were determined, *1mo*, The expence of upholding the tenants houses, laid out by the master, was to be a deduction from the rental. *2do*, The rent paid for the supernumerary houses over and above what was necessary for labouring the ground, was sustained as a deduction from the rental, and that whether the rent was directly paid to the master or tenant, because tho' such houses are generally set with a bit of ground to tradesmen, the rent is rather in consideration of the houses, which are not a subject teindable, than of the ground. *3tio*, A deduction was allowed upon the account of a moss set to a tenant, out of which he was allowed to win and sell peats, because moss is not a teindable subject, and a higher rent must be understood given upon

upon account of this privilege. 11th December 1734, Heretors of Calder *contra* the University of Glasgow. — In a valuation, deduction was allowed out of the rental of a certain sum, as the yearly value of an heretable tolerance of casting peats upon a neighbouring tenement, purchased to the land by the pursuer's author. 16th February 1737, Skeen of Lethindy *contra* King's College of Aberdeen. — A loch being drain'd at great expence, and the soil brought to be arable land, the same was found not to come *in computo* in valuing the teind; for the Lords were of opinion, That where rent arises from an extraordinary improvement, the titular has no claim, as has frequently been found in the case of grounds improved by inclosing; and tho' here the question was with a singular successor, who had purchased the land after it was drained, yet it was considered, that if the ground, while the property of the person who improved the same, was not subject to teind, the transmitting of it to another hand could not subject it to a new burden. 18th July 1739, Heretors of Calder *contra* College of Glasgow.

IN a process for parsonage teinds, at the instance of a tacksmen against an heretor, who had little arable ground, but most part grass, the question being, what was to be reputed parsonage and what vicarage in such a case, and what should be the rule and standard for estimating parsonage teinds as to bygones? the Lords found, That the sowing and holding for seven years backward could not be the rule here, but only the fifth part of the rent, deducting a stock for the vicarage, which must be proved what it will amount to, the same being local and consuetudinary, so that it is different in several parishes according to custom and the use of payment. Fountainhall, 29th January 1706, Earl of Galloway *contra* M'Guffock.

THO' the fifth part of the rent is the legal estimation in questions betwixt the titular and heretor, yet in other cases, where the true value of the teind is to be considered, the fourth part of the rent payable jointly for stock and teind is the rule. This found betwixt the tencer and heir. Stair, 9th February 1667, Moncrief *contra* Tenants of Newton. — In a process of sale it did appear, That the rent payable by the tenant was only for the stock, and that the heretor drew the teind, and the Lords considering, that drawn teind is more or less valuable according to the nature of the ground, and that in this case the lands lay on the sea coast, and had the benefit of ware, therefore they did estimate the teind to a fourth part of the whole, that is, for every three bolls payable by the tenant for the stock, they added a fourth for the drawn teind, and ordered the rental to be framed accordingly. Dalrymple, 10th December 1701, Sir William Hope *contra* Creditors of Balcomy.

AN augmentation of a minister's stipend being to be allocated proportionally upon the titular and another heretor who had an heretable right to the teinds of his own lands, and the rent of the titular's lands having been considerably augmented about the commencement of the process, by tacks granted by him to continue for the space of nine years; the titular pleaded, That the old rent must be the rule, in respect these new tacks were no absolute proof of the true rent of the lands. The heretor on the other hand pleaded, That tacks for nine

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5 T

years,

2do, When
separate.True value
of the teind.Rent of the
land how to be
adjusted?

years, set to a variety of good tenants, who have all found caution for the tack-duty, is an absolute good proof of the real worth of the lands; and he further offered to prove, That the lands were truly worth what they presently paid. The Lords steered a middle course, and found the titular must bear a proportional part of the augmentation corresponding to his old rent and half of the new. 1st February 1738, Duke of Douglas *contra* Elliot of Woolie.

Who have
right to pur-
sue a valua-
tion?

FOUND, That the clause in the commission of teinds anent liferenters, could not be extended to rentallers, who had a rental during their own and the setter's life, so as to give them right to the benefit of valuation of teinds; but the Lords declared, That when any action should be pursued against rentallers for their teinds, they would have consideration of the rentals, and what should be in equity paid by them for their teinds. Durie, 8th March 1639, Ld. Heafilhead *contra* his Tenants.

In localling
the stipend,
the titular
may exempt
his own teinds.

IN a process of locality the Lords found, That the Earl of Galloway having right to the whole teinds of the parish of Kirkcolm, in virtue thereof could exempt his own lands even from that part of the stipend which had been immemorially paid out of them to the minister. This was found, *1mo*, Because the act 23, parl. 1693, makes no distinction, but allows, in general, patrons to exempt the teinds of their own lands. *2do*, From the nature of the thing, because when a patron or titular has right to the whole teinds of a parish, it is equal to him how the stipend be paid, whether out of the teind of his own or other people's lands, for still he draws the remainder. An use of payment of this sort is as much *voluntatis* with respect to the titular, as it is with respect to the proprietor to lay the burden of the minister's stipend, sometimes upon one farm, sometimes upon another.

February 1731, Earl of Galloway *contra* Agnew. — A titular of the teinds of a whole parish, having given to an heretor an heretable right to the teinds of his own lands, to be held of the titular himself for payment of 100 merks yearly of teind or feu-duty, which was pretty near the sum that fell to be laid upon these lands in a proportional allocation of the stipend; in a process of locality, the Lords refused to allocate any part of the stipend upon this heretor, in regard it was implied in the transaction, that he was to have right to his own teinds, absolutely free from the burden of any part of the stipend; that it must be presum'd he paid an adequate price for the same, and it would be making him pay a price for nothing, if the next day these whole teinds could be evicted from him and allocated to the minister. 1st February 1738, Duke of Douglas *contra* Elliot of Woolie. — The act 1693 provides, "That the teind of lands belonging in property to the patron, titular or tacksman, shall be free of any allocation to the minister, if there be free teinds beside;" in a process of sale of teinds at the heretors instance against a tacksman, who had a tack comprehending the teinds both of the pursuer's lands and of his own, and whereof the tack-duty was totally allocated to the minister; the tacksman insisted upon the above act to have the whole tack-duty laid over upon the pursuer, in consequence of which he would have the teinds of his own lands free, without paying any tack-duty therefore. It was answered, *1mo*, The act of parliament gives a power of allocation

tion to the titular or tackfman, but gives no power to alter the locality, being once fixed by decret. *2do*, The tack-duty is not the teind of the tackfman's own lands, but what he has covenanted to pay for the teind, which, in all events, he must pay, either to the titular or to the minister. The Lords found, That the defender cannot exempt his lands of any part of the tack-duty. 11th February 1730, Somervell of Kennox *contra* Stewart of Kirkwood.

A TACK of teinds prorogated for a second five nineteen years, upon account of burdens laid upon the tack during the first prorogation. 5th July 1732, Earl of Galloway *contra* the Crown. Prorogation of a tack of teinds.

PARSONAGE teind may be purchased by the heretor, as well while they are in tack, as where they are in the possession of the patron. 22d November 1721, Hay of Drummelzier *contra* Sir John Home of Blackadder. What teind saleable?

THE annuity is a burden upon the principal tackfman, unless the contrary be expressed, and divides not betwixt him and the sub tackfman, in proportion to the benefit that each has by the teinds. Stair, 27th July 1673, Montgomery *contra* Montgomery. Annuity of teind.

USE of payment of a stated duty in place of teind. See Tack.

STIPEND debitum decimarum. See Stipend.

T E N O R.

AS an obligation out of the creditor's hand is presumed to be satisfied and retired, therefore to say that a writ is lost, is truly to own that it is satisfied and retired, unless the creditor will alledge and prove *quomodo desit possideri*; for this reason the *casus amissionis* must be distinctly libelled in processes for proving the tenor, without which the libel will not be sustained relevant nor admitted to probation: And as retiring of bills, bonds, and other single obligations, often without any written discharge, is more customary and easy than that of other deeds, the Lords, according to the nature of the deed, will be satisfied with a *casus amissionis*, more or less pregnant, but with regard to discharges and renunciations, which are permanent documents, and not capable of being retired or transferred, in libelling the tenor of such like writings, there is no necessity to condescend upon any *casus amissionis*. Haddington, 22d January 1612, Ogilvie *contra* Napier. — The Lords refused to admit the tenor of an evident to be proved by witnesses, unless the *casus amissionis* were clearly proved. Colvil, June 1588, Falcon *contra* Towris. Casus amissionis, in what cases must it be libelled?

IN proving the tenor of an apprising led in the year 1621, the summons did not libel witnesses, which the Lords dispensed with. If the writer and witnesses must be relibelled?

re tam antiqua. Marcus, (*Proving the Tenor*) December 1684,
Peppermill *contra* Mr. George Roome.

What if it
be not proved
who were the
writer and
witnesses?

A CREDITOR pursuing for delivery of his bond, which he had intrusted to the defender, and the defender, who had lost the bond in a process, being allowed to prove the tenor in way of defence; the Lords sustained the tenor as proved, tho' it was not proved who were the writer and witnesses, which the pursuer alledged would make the bond null by act of parliament; for the Lords thought it was not competent to the pursuer to object against his own bond, and therefore reserved this point to be considered, in case the debtor should think proper to make the objection. Stair, 13th January 1681, Calderwood *contra* Courtie. — Against a concluded proof of the tenor of a bond, upon which adjudication had followed, it being objected, That the names and designations of the writer and witnesses were not proved, yet the *casus amissionis* being notour, the bond old, and its verity not questioned by the debtor or his other creditors, and the proof being only craved to support the adjudication, the Lords found the tenor of the bond proved. Dalrymple, 13th, Fountainhall, 14th June 1707, Trotter *contra* Home of Eccles. — At advising the proof in a process of tenor, it was objected, That one of the witnesses was not sufficiently designed, being described only as servant to such a man, who was not designed. Answered, the pursuer is willing to take the decret in terms of his proof, reserving to the defender his objections; and if the objection were good *hoc loco*, no party could be allowed to prove the tenor of a writ, against which any exception could ly, which would be unreasonable: For if an evident is lost, he ought to have a decret to put in place of it, leaving him to make the best of it he can. 'Tis a different case where the names and designations of writer and witnesses are libelled; for in that case, if they be not proved, an objection may ly, that decret cannot pass, because the whole tenor of the deed is not proved. Fountainhall, 26th June 1712, Inglis *contra* Lord Alexander Hay.

Decreet of
tenor null, if
the solemnities
of the deed are
not proved?

A DECREET of proving the tenor of a bond, and an adjudication following thereupon, found null, for this reason, That it was not proved who was the writer and witnesses of the bond; for the Lords considered, That the decret of tenor could not be more effectual than if the bond itself were produced without writer or witnesses. Forbes, 17th July 1713, Blackwood *contra* Hamilton of Grange.

In what
cases relevant
to libel a proof
by witnesses,
without admini-
cicles?

A PROBATION of the tenor was rejected, because no adminicles in writ were produced, altho' the tenor of the writ was shown, and the faith of it offered to be proved, as also the *casus amissionis*. Colvil, February 1588, Ld. Fedderat *contra* Ld. Drum. — The tenor of a bond of relief, alledged to be destroyed when the creditor's house was burnt, was found relevant to be proved by the writer and witnesses insert, without any adminicles in writing: It was urged here for the defender, That the libel was not relevant, unless some relative writ were produced to give some *qualis qualis* evidence, that the bond was still a subsisting debt; for otherwise, when a man's house happens to be burnt, he might rear up every bond that was paid to him, and retired by the debtor for 40 years backward, unless the debtor were
so

so provident, which seldom happens, as to preserve the bond after it is retired and cancelled. To which it was answered, That in proving the tenor of real rights, charters, sasines, &c. it may be necessary to libel relative writs, to adminiculate the same, because, from the nature of our real conveyances, there must be such writs; but personal bonds are often granted without relation to any other writ whatever; and therefore, as the pursuer has in this case libelled all that can be expected, and that impossibilities cannot be required of him, the proof he has offered, must, at least, have this effect, to found the presumption in his favours, that the bond is still outstanding, unless the defender will bring some evidence, that it was implemented and retired by him. Durie, 19th July 1636, Lord Frendraught *contra* Ld. Bamff. — Found, That the tenor of an assignation of L. 100 sterling of fishing-stock, alledged to have been granted by my Lord Kincardin to Broomhall, could not be sustained, unless there were some adminicle in writ produced, tho' the witnesses offered for proving the same were my Lord Kincardin's friends. Marcus, (*Proving the Tenor*) March 1684, Countess of Kincardin donatrix *contra* Broomhall. — In a process for proving the tenor of a contract of marriage, a copy of the contract was produced taken out of the writer's stile book, and the tenor was offered to be proved by the writer and his servant, and other probabilities were urged for the existence of the contract: It was objected, That the libel is not relevant without adminicles in writ, especially where the contract is libelled to be of a singular nature, providing the fee of half the estate to go to the wife's heirs, failing heirs of the marriage, and a stile book, being no authentick deed, cannot be sustained as an adminicle. The Lords refused to sustain the libel relevant, without adminicles in writ, upon this special consideration, That our law, *ob lubricam fidem* of ordinary witnesses, does not rely upon their testimony singly in matters of great importance. Stair, 13th, Dirleton, 14th June 1667, Harroway *contra* Haitly. — In a process for proving the tenor of a contract of marriage, where it was not libelled, That the contract bore any obligation to infest, or to execute any other deed in implement of the husband's obligation to provide his wife in a jointure, so that no adminicles could readily be expected in writing; and where the relict, pursuer, offered to prove the tenor by the writer and instrumentary witnesses, with this circumstance, That the defunct husband gave the writer his contract of marriage with a former wife, with orders to draw the contract in question of the same tenor; the Lords finding the matter of difficulty, pronounced an act, before answer. In this case the parties were of that rank as to found a *præsumptio hominis* at least, that there was a contract of marriage: And in a case of this nature it was not necessary to qualify any very special *casus amissionis*, because it is never to be presumed a wife will grant, or a husband chuse to accept of a gratuitous discharge of a contract of marriage; and here it was not alledged the relict was otherwise provided. Gosford, 22d January 1674, Cranston *contra* Swinton. — In a probation of the tenor of a contract of marriage, in which it was libelled, That the husband had destroyed the same by violence, and the draught of it was produced, which was offered to be proved to be the hand writ of a notary, now dead, who drew the contract; the Lords, tho' there was no adminicle in writ, sustained process, in respect of the *præsumptio juris*, that there is a contract of marriage,

where the marriage is betwixt persons of any *distinction*; and this was found, tho' the contract was libelled to be of a singular tenor, as providing a part of the pursuer's tocher to her children of a former marriage. Stair, Dirleton, Gosford, 9th June 1674, Cuninghame *contra* Greenlees. — A notary's prothocal being casually burnt, the Lords allowed the party to prove the tenor of an instrument given out therefrom, and the *casus amissionis* of the said extended instrument, *per testes qui sciverunt & legerunt dictum instrumentum*. Sinclair. February 1541, Dickson *contra* a Notar.

What adminicles relevant to admit the libel to further probation?

In a process for proving the tenor of an interdiction, tho' there was no writ produced subscribed by the party relative to the interdiction; the Lords sustained process upon the letters of publication, as a sufficient adminicle, seeing such writs as interdictions use not to be retired like bonds. Stair, 26th July 1662, Lady Milton *contra* Ld. Milton. — The adminicles in writ in the probation of the tenor of a disposition, being a minute of contract, containing an obligation to dispoise, as also the extract of the sasine following on the said disposition; the Lords found these documents sufficient to admit the tenor to further probation. Fountainhall, 15th December 1702, Douglas *contra* Somervell.

What adminicles make a sufficient proof of the libel, without aid of witnesses?

To prove the tenor of a bond granted for the price of victual, which was alleged to be lost among the pursuer's other writs when his house was burnt, the following adminicles being produced; *1mo*, An instrument of requisition of the victual referring to the bond. *2do*, Letters of horning upon the bond. *3tio*, A suspension of a charge upon the horning, which the pursuer insisted were *per se* sufficient adminicles to found a decret of tenor, without necessity of further proof: It was objected, That the adminicles libelled might be sufficient to infer a relevancy of the libel, but by no means to be a full proof of the tenor, for this, among many other reasons; That a tenor cannot be proved, unless it be instructed who were the writer and witnesses. The Lords sustained the libel relevant upon these adminicles, but found they were no sufficient instruction of the tenor; and therefore admitted the same to be proved by the witnesses instrumentary, or others. Stair, 12th December 1672, Brodie of Lethem *contra* Douglas of Muldarg. — The tenor of an assignation found sufficiently proved by the following adminicles; *1mo*, A backbond relative thereto, and wherein it was fully narrated, granted by the assignee to the cedent. *2do*, A comprising following thereupon, it being *in re antiqua*, where witnesses could not be expected. Gosford, 24th July 1669, Johnston *contra* Arnot. — The tenor of a bond of 13000 merks, and an assignation thereof, found proved by writs and decreets before the Lords, narrating the substantial of them, *viz.* debtor, creditor, sum, annualrent, penalty, and term of payment of the bond, and the substantial of the assignation, so much as uses to be recited in writs and productions in a decret before the Lords: Here there were no witnesses deponing on the tenor, the writs being dated in the 1636, and the witnesses insert being dead since intenting of the tenor, which was delayed through the defender's litigiousness; and the *casus amissionis* was, That these writs were delivered to my Lord Argyle, as appeared by his receipt produced. Harcus, (*Proving the Tenor*) 2d February 1682, Lesmore *contra* Marquis

quis of Huntly. — For proving the tenor of two charters, the Lords sustained two *saſines*, wherein these charters were engrossed *ad longum*, and some decreets, bearing production of the charters, sufficient adminicles, and found the tenor proved thereby without witnesses, the writs to be made up being very old. *Harcus, (Proving the Tenor)* March 1685, *Kinnier contra Kellie*. — An instrument of *saſine* taken upon an heretable bond in favours of the original creditor, a precept of *clare constat* and *saſine* thereupon in favours of his heir, being all three lost; the Lords found the tenor sufficiently made up upon the following adminicles; *1mo*, The extracts of the two *saſines* out of the record. *2do*, The heretable bond their warrant. *3tio*, A decret of poinding the ground founded upon them. Fountainhall, 26th June 1712, *Inglis contra Lord Alexander Hay*.

To prove the tenor of a disposition, pursued at the instance of one for whose behoof the deed was burdened with a certain sum against the disponent's heirs, the adminicles produced were an instrument bearing, That the disponent went to kirk and mercat, and adhered to the disposition made by him in favours of Murray the disponent. *2do*, The disposition of the granter's apparent heir, recovered out of a former process, bearing, That he saw the disposition in question in the hands of Murray the disponent. *3tio*, A scroll of the disposition. It was further proved by the writer of the disposition and his servant, and by the instrumentary witnesses, That the disposition was conform to the scroll, and subscribed by the defunct and witnesses. It was objected by the defender, That there were no adminicles produced to make out that this was ever a delivered evident. Answered, It is proved, by the above deposition, That it was in the disponent's hand, and by the writer and witnesses, that it bore a clause dispensing with the not delivery. Here there was no necessity to qualify a *casus amissionis*, because retiring or renouncing the disposition would be no defence against payment of sums, with which the disposition was burdened. The Lords found the tenor sufficiently proved. Stair, 2d January 1680, *Lithgow contra Murrays*. — It was found a sufficient adminicle to make up a disposition, That the granter had subscribed as witness in a disposition of reversion of the same lands, narrating his own disposition, now questioned by his heir, which the Lords conjoined with the testimonies of the witnesses, who saw and read the said disposition. Fountainhall, 21st February 1680, *Baillie contra Pitillo*. — In a proving the tenor of a disposition, the following points were proved; *1mo*, That it had been recovered out of a third party's hand by an exhibition. *2do*, That it had been produced in process, and made the foundation of a decret *cognitionis causa*. *3tio*, A full copy of it attested by two famous notaries. It was observed for the defender, That this was no complete proof to make up a disposition of lands, seeing there was no evidence in process of the writer, instrumentary witnesses, or any other person who saw the deed executed or acknowledged by the alledged granter; and supposing the deed to have been forged, it might have been produced in process, and an attested copy taken of it as a true deed, which indifferent parties would not be ready to suspect or challenge. The Lords, notwithstanding, found the tenor of the disposition proved. Dirleton, 27th November 1675, and 15th February 1676, *Anderson contra Lowes*.

Proof of
the tenor of a
disposition.

Proof of the
tenor of a con-
tract of mar-
riage.

IN the proving the tenor of a contract of marriage, which was raised only *incidenter*, to satisfy the production in an improbation of an apprising, whereof that contract was the ground, the adminicles produced being a decret *in foro*, mentioning the production of the extract of the contract, with the apprising, charter and *safine* thereon; and the pursuer having adduced witnesses, who saw and read the said contract, and proved also, That the relict, by that apprising, possessed the lands for many years: The Lords thought, that there was a difference betwixt the making up of a writ to be the ground of a future action, and a tenor craved, only to shun certification on a presumptive falsehood; and therefore found, That there being no presumptions of real falsehood against this contract, and the adminicles being so pregnant, tho' neither all the clauses, nor date were fully proved, yet that there was sufficiency to exclude the certification, and so assoizied from the reduction. Fountainhall, Forbes, 21st November 1707, Waddel *contra* Waddel and her husband.

Of a procu-
ratory of re-
signation.

IN a proving the tenor of a procuratory of resignation, the Lords found the tenor proved, (altho' *rei gesta veritas* was not, nor could be proved, in respect it was *factum antiquum* and the witnesses dead) the pursuer's witnesses having deponed, That they saw the procuratory and were present at the resignation, the pursuer also having produced the contract, whereby the party was obliged to dispoise, together with the instrument of resignation, wherein the procuratory was insert *ad longum*, as also his Majesty's charter following upon the said resignation. Hope, (*Proving the Tenor*) 24th July 1622, Earl Melrofs *contra* Lumisden.

Of a *safine*.

IN a proving the tenor of a *safine* of burgage in Kintore (where there was no record or register) in *anno* 1627, the *casus amissionis* libelled, was, That it was put out of the way by the relict or her neglect; the adminicles were two renunciations of two wadsets of the saids tenements and acres, narrating, that the granter of the wadset was infest and seased; the Lords sustained the tenor of the *safine*, which was proved by witnesses, who said the notary expon'd it to them, being Latin. Here the tenor had no witnesses libelled. Marcus, (*Proving the Tenor*) March 1682, George Cheyne *contra* Seaton.

Of an adju-
dication.

A PURSUIT for making up the tenor of a comprising was sustained, in respect the adminicles were most pregnant, and in special the executions were yet extant and intire. Dirleton, 29th June 1675, Birny *contra* Montgomery. — A party for proving the tenor of a decret of adjudication having produced the following adminicles; 1^{mo}, A contract of marriage, which was the ground of the debt. 2^{do}, The decret of constitution. 3^{tio}, The summons of adjudication extracted from the signet. 4^{to}, The extract of the allowance. 5^{to}, An executed horning against the superior. 6^{to}, The charter and *safine* thereon. 7^{mo}, The attestation of the keeper of the minute-book that it was put up there. 8^{vo}, The responde-book, bearing the clerk's dues paid for it. The Lords shunned to determine the general point, how far the tenor of decreets or other judicial acts may be proved; but advising the special case before them, they found the adminicles not sufficient. Fountainhall, 14th March, Forbes, 21st June 1707, Ld. Airth *contra* Blackwood and Hamilton of Grange.

To

To prove the tenor of a decret of prorogation of a tack of teinds, the following adminicles were produced; *1mo*, The original tack. *2do*, A copy of a decret of augmentation in the 1618, imposing a considerable burden upon the tacksmen, and bearing, that a recompence was granted in consideration of that burden. *3tio*, The minute-book, expressing that recompence to be a prorogation of six 19 years. *4to*, A subtack relative to the principal tack and prorogation, and subsetting a part of the teinds for the same years to which the prorogation extended. *5to*, Possession conform. *6to*, Offered to prove by witnesses who saw the prorogation amongst the records shortly before the late fire. It was objected, That the tenor of a decret cannot be proved, because the validity of it depends upon formalities, which witnesses are not presumed to know or allowed to prove. The Lords admitted the adminicles and tenor to probation. Dalrymple, 26th December 1704, Lord Register *contra* Heretors of Birie.

FOUND, That the act 94, parl. 1579, discharging proving the tenor of letters and executions of horning, did not extend to proving the tenor of executions of apprisings. Fountainhall, 9th December 1677, Boyd *contra* Malloch.

A CHARTER of confirmation, containing in it the whole charter confirmed, is to all intents and purposes as sufficient for proving any thing to have been insert in the said charter confirmed, as if itself had been produced. Maitland, 15th July 1564, Hamilton *contra* Lord Somervel. Balfour, (*Writs*) 18th December 1564, Brown *contra* Williamson.

BOTH parties having taken instruments upon pronouncing of a decret-arbitral, the Lords found, That the said extended instruments, containing the tenor of the decret, was sufficient without production of the principal decret. Maitland, 1567, Ld. Clova *contra* Ramsay.

IN a pursuit upon a bond of corroboration it being alledged, that the principal bond ought to be produced; this was repelled by the Lords, because the brocard *Non creditur referenti, &c.* holds only in the case where there is no more but a naked relation to a writ, and not where the writ that relates thereto doth proceed to an obligation thereupon, and is not only relative but dispositive. Dirleton, 24th February 1676, Johnston *contra* Orchardton.

THE Lords refused to sustain a compensation founded in this manner, *viz.* the discharge produced bears all compts, reckonings and debts betwixt them to be discharged, except a bond for a certain sum, which is declared not to be comprehended under the generality afore-said, and therefore allowance was craved of that sum; this the Lords refused, because it related to a bond which was not produced, so that the exception could neither constitute nor instruct the debt: But the author seems to think it would have been otherwise decided, if such a clause had related to a debt without mentioning either bond or ticket by which it was constituted; because in that case the rule *Non creditur referenti, &c.* could not take place. Fountainhall, 11th November 1696, Philp *contra*

T E R C E.

In what subjects has it place?

THE relict has no claim for the terce of any superiority belonging to the husband. Sinclair, March 1541, *Ld. Glenbervy contra Lady Lufs.* Consequently has no claim to feu-duties. Durie, Spotiswood, (*Terce*) 13th February 1628, *Lady Dunfermline contra Earl.* — Nor to blench-duties. Spotiswood, *ibid.* — A relict can have no terce of lands holden burgage. Haddington, 20th June 1612, *contra* . — The terce extends to the third of the teinds in which the husband died heretably infest. Durie, 13th February 1628, *Lady Dunfermline contra Earl her son.* — The relict by her terce has no right to the teinds, unless where there is an infestment of the teinds by erection; and therefore in a pursuit against a tenant who paid a duty jointly for stock and teind, a fourth part was deduced as the worth of the teinds, and the relict got the third of the remainder. Stair, 9th February 1667, *Moncreif contra Tenants of Newton.* — In a question of terce, alledged, That as the mannor-place belonged to the fiar without division, so behoved the close, gardens, orchards, yards, &c. the Lords, in respect nothing was alledged or instructed that there was a tower, fortalice, or mannor-place having a garden or orchard for pleasure rather than profit, found no necessity to decide what interest a tercer would have in such; but these being set by appearance as grass-yards, they repelled the alledgeance, and found the tercer entitled to a third part of the rent paid upon that account. Stair, 9th February 1667, *Moncreif contra Tenants of Newton.* — An heir who has two thirds is preferred in the possession of a house, being *unum tenementum indivisibile*, to the relict, who has one third thereof by her right of terce; but it was found, That if the fiar did not dwell in the house himself, the relict should be preferred, giving as much mail as any other tenant, and giving caution for the other two third parts. Stair, Newbyth, 26th January 1665, *Logan contra Galbraith.*

In what circumstances has it place?

A FATHER in a contract of marriage being obliged to infest his son in lands, and failing so to do, the son's relict was nevertheless found to have right to her terce of these lands, as if her husband had been infest. Balfour, () *Ld. Blair contra Hamilton.* Spotiswood, (*Terce*) — No terce was found due of lands wherein the husband was not infest, and that it would be too arbitrary to go upon presumptions and designs that the defunct lay out uninfest, on purpose to defraud the relict, or deprive her of her terce; and the Lords thought it was much safer to keep by the rule, and that it would better ascertain the lieges of what they had to expect. Fountainhall, Forbes, 29th January 1706, *Carruthers contra Johnston.*

A RELICT was found entitled to a terce, notwithstanding her defunct husband had disposed the lands to his eldest son in the eldest son's contract of marriage, reserving his own liferent, who was thereupon infest base, holding of the disponent; such dispositions being understood fraudulent in order to disappoint the terce. Fountainhall, 1st December 1711, Forbes, 15th February 1712, *Marquis of Annandale contra Scot.*

IN

IN a removing at the instance of a compriser against the relict of the debtor, altho' she was served in a terce before the pursuer's sasine, and that her husband died before the said sasine was taken; yet the Lords found, That the comprising so denuded him that she could not be served to a terce after his decease. Hope, (*Liferents*) Crichton *contra* Relict of Ld. Comiston. — Adjudication, with a charge against the superior, found to exclude the terce. Bruce, 28th January 1715, Creditors of Hunter *contra* Douglas. — The contrary afterwards found, because adjudication with a charge is not a real right, it is only equivalent to a real right among competing adjudgers. Home, 9th February 1725, Carlisle *contra* Creditors of Lyon.

FOUND, That a woman being kenne'd to her terce, has right to all the profits thereof from her husband's death to her own decease, altho' she was kenne'd many years after her husband died. — Balfour, (*Terce*) 21st February 1532, Crichton *contra* Hamilton. — In a competition betwixt the heir and Lady tercer, where the heir had obtained decreet against the tenants as heretor, the Lords found, That notwithstanding the decreet, the Lady ought to have her terce out of the lands, and that not only of the years subsequent to her service and kenning, but also of all years preceeding the same from the time of her husband's decease, to which they found the service ought to be drawn back. Durie, 25th November 1624, Tenants *contra* Crawford. Durie, 30th November 1627, Tenants of Easthouses *contra* Hepburn. — A Lady tercer pursuing the heir sometime after her husband's decease, the heir having uplifted all, and got higher duties from the tenants than they had formerly used to pay to the defunct; the Lords found, That she had good right to seek her terce out of that quantity which was uplifted by the defender, for the duties of the lands, and that she was not to be restricted to the quantity paid in her husband's time, because the defender ought to pay back what he had really received, and had no just reason to retain. Durie, *ult.* January 1628, Lady Dunfermline *contra* her son.

THE exception of possessing *pro indiviso* made by a tenant against a tercer pursuing a removing, was repelled, tho' the lands were not arable but mountain and grafs ground; but the defender offering obedience, and to remove from the third, was allowed commission to the sheriff either to stent the holding of the lands, that the pursuer might have the third part of the sums and the right of pasturage proportionally, or else to measure the lands, and set apart the third part thereof to the pursuer, either of which was found competent to be done in this action of removing. Durie, 18th January 1628, *contra* M'Kenzie.

LANDS being burdened with real burdens, the Lords found the terce only due out of what was free, and altho' the heir redeem them after his father's decease, yet that the relict can claim no terce thereof. Auchinleck, (*Terce*) 15th February 1633, Lady Balmaghie *contra* the Laird.

A LADY's jointure being reduced by a creditor, who had inhibited before her contract of marriage, and she thereafter claiming a terce,

as if she had not been provided at all ; this the Lords refused, because that having once founded on her contract, and renounced all terce, &c. she could not afterwards recur thereto. Fountainhall, 9th February 1697, Creditors of Balquholly *contra* the Lady.

TERCE, if it excludes ward, forfeiture, nonentry, liferent-escbeat, &c.? See under these several heads.

WHAT action the tercer has upon serving, upon kenning, &c.? See Title to pursue.

IF the tercer has right to coal, wood, &c.? See Liferenter.

FROM what term the terce takes place? See Term conventional and legal.

Term legal and conventional.

Annualrent due at the term subsequent to the creditor's death, if it falls to the executor?

THE creditor in an heretable bond dying before the term at which the half year's annualrent was made payable, that half year's annualrent was found to belong to the heir as well as the principal sum itself, seeing the same, not being payable till after his decease, could not be repute *in bonis defuncti*, to be the subject of confirmation. Durie, 8th January 1624, Children of Henderson *contra* Murray. Spotswood, (*Annualrent*) 10th March 1630, Lindsay *contra* Heriot. — A man having died infest in an annualrent, his relict, as tercer, was found to have right to the third part of the term's interest that fell due immediately after his decease, tho' most of the term was run before. Here the question was with the heir, not with the executor of the defunct. Durie, *ult.* November 1627, Tenants of Easthouses *contra* Hepburn. — An infestment of annualrent being conceived in favours of the creditor and his wife in conjunct-fee and liferent, and payable at two terms, Whitsunday and Martinmas, by equal portions, the half year's annualrent, which fell due after the creditor's decease, was found to belong to his relict, and no part to the executor, tho' a part of the term was run before his decease. 11th January 1738, Carruthers *contra* Barclay.

Rent of lands in medio at the proprietor's death, how it divides betwixt the heir and executor, &c.

IN clearing the respective interests of the heir and executor with regard to the rents of land unuplifted by the defunct, the natural rule is, That nothing can belong to the executor but the rent of that term which was past before the predecessor's death, and which term's rent came thereby to be *in ejus bonis*. And as of old our rents in Scotland were generally paid, the half at Whitsunday, the other half at Martinmas for that year's crop, hence these came to be understood the fixed terms, by which all questions were determined betwixt the heir and executor, without regard to the many various conventional terms, which afterwards came to be in use among us, which conventional terms were understood to be merely for the benefit of the master

master or tenant, as the payment of the rent was advanced or postponed; and so in questions betwixt the heir and executor these conventional terms were quite overlooked, and the rule continues to be the same as originally, That if the proprietor survived Whitsunday, his executor has right to the half of the rent payable for that crop, at whatever time the rent is payable, and to the whole, if he survived Martinmas: Upon this footing the executors of a husband were found to have right, *jure mariti*, to the whole rent payable for that year wherein he died, he having survived Martinmas, tho' the said rent was not payable till the Whitsunday thereafter. Gosford, 23d July 1668, *Carnegie contra* Executors of her husband. — In a grafs room, whereto the tenant's entry was at Whitsunday, the half year's rent payable at Martinmas, and the remainder at the Whitsunday thereafter, the proprietor dying in January 1721, the question was, Whether the half year's rent, payable the next Whitsunday, fell under his executry? It was agreed, That the term of entry or term of payment signifies nothing in this dispute, that it is the crop, year and possession which regulates all. But it was contended, tho' in corn rooms, where the rent payable at Whitsunday 1721, is payable for crop 1720, the proprietor surviving Martinmas 1720, that rent falls under his executry; yet in grafs rooms, where the half year's rent payable at Whitsunday 1721, is actually payable for the possession betwixt Martinmas and Whitsunday, unless the proprietor survive Whitsunday, such rent cannot fall under his executry. It was contended on the other hand, That in this case the rent payable Whitsunday 1721, is payable for the possession and grafs 1720, for there being no corn, 'tis the grafs that makes the crop. The inhabitants of that country make their advantage by the lambs, wooll, cheefes, &c. which arise and are produced in the summer time, and generally thereabouts, the full rent is payable at Martinmas, only it happens, by particular paction, that the rents in question were not payable till the Whitsunday; the proprietor therefore having survived the time for the crop and possession of which the rents in dispute were payable, they, in consequence, fall under his executry. The Lords found the rents in dispute fell under the defunct's executry.

February 1727, Sir William Johnston *contra* Marquis of Annandale.

QUESTIONS betwixt the relict and the representatives of her deceased husband, with regard to the commencement of her jointure, do resolve themselves into the former case; for she, as proprietor for life, comes in place of the heir of the defunct, and draws the rent in place of him; therefore the husband having died betwixt Whitsunday and Martinmas, his relict infest as conjunct-fiar, was found entitled to the half of the rent payable for that crop. Durie, 21st January 1629, Lady Ayton *contra* Home. — But where the husband survived Martinmas, his relict provided to a jointure of certain chalders of victual, to be uplifted yearly betwixt Yule and Candlemas, was found to have no claim for any part of that year's rent, but that the husband's executor had right to the whole. Stair, Fountainhall, 12th January 1681, Trotter *contra* Rothead.

IN the like manner are the questions resolved that arise upon the death of the liferentrix betwixt her executors and the fiar, she takes the place of the defunct proprietor, and the fiar draws what the heir would draw in the common case; thus the fiar was found entitled

but to half of the rent payable for that year's possession wherein the liferentrix died, she having survived Whitsunday. Durie, 1st February 1631, Ld. Blaus *contra* Winram. — The like was found where the relict's jointure was constituted by a personal bond, not relative to any lands; but then the jointure was payable in victual, the one half at Lammas, the other at Candlemas; which payment of victual, seeing it was the product of land, the Lords found, made the case the same, as if she had been infest in lands. Fountainhall, 14th February 1684, Baillie *contra* Cuthbert. — A tack set by a Lady of her jointure lands to the heir, the duty payable at two terms, Whitsunday and Martinmas, "by equal portions, yearly, termly, and proportionally during her lifetime," was found due for the term preceeding her death, but not from that term till the day of her death, which happened about four months after. Forbes, 22d February 1711, Laurie *contra* Maxwell.

Mill-rent
how it di-
vides?

A TENANT'S entry to a mill being at Whitsunday, and the master deceasing in December thereafter; the Lords found, That the whole year's duty pertained to his executor, and no part thereof to the heir; altho' it was alledged for the heir, That the duty of a mill is not like other farms, which have relation to the crop preceeding, but is paid for the use of the mill from year to year; and therefore, in the present case, the half of the duty only should belong to the executor. Spotiswood, (*Executor*) Durie, 21st February 1635, Ld. West Nisbet *contra* Ld. Swinton. — The legal terms of mill-rent being Whitsunday and Martinmas, the liferenter surviving both these terms has right to the whole year's rent, the same way as in land-rents, and not to the one term only, as in house-mails. Stair, 20th July 1671, Guthrie *contra* M'Kerston. — The same. Gosford, 4th, Stair, 8th December 1671, *inter eosdem*.

Rents be-
longing to the
chappel-royal.

FOUND, That the legal terms did not regulate the rents of the chapel-royal, gifted to his Majesty's chaplains, but that the same were due *de die in diem*, by a clause in the gift, bearing "bygones from the period of the death of the former donatar." It was also suggested, That salaries paid out of the civil lists run *de die in diem*; as also the the Lords of session's salaries, and all exchequer gifts. 20th February 1736, Relict of Mr. Thomas Linning *contra* Mr. William Gustard.

Pension, sa-
lary, &c.

A PENSIONER whose pension was payable out of the teind-sheaves of a ground, deceasing after Whitsunday, but before the harvest; the Lords found, That his executor could have no right to any part of that year, altho' it was a debt which was running, & *ubi cedebat dies, licet non venerat* when he departed. Durie, 24th June 1630, Scrimzeour *contra* Ld. Denmill. — A pensioner dying before Whitsunday, the Lords found, That his representatives had no right to that crop wherein he died, and found no difference betwixt a pensioner and a liferenter. Newbyth, 13th July 1666, Earl of Kelly *contra* Bethun. — The Lords found, That the governor of a garison, whose commission from the government was recalled after Whitsunday, was entitled to half of that year's rent, tho' only payable in victual, betwixt Yule and Candlemas thereafter, and tho' the succeeding governor was expressly assigned in his commission to that whole year's rent. Forbes, 28th June 1710, Earl March *contra* Earl of Leven.

A COMPRISER

A COMPRISE insisting for the mails and duties of a liferented land, after the liferenter's decease, who had laboured the land himself, and deceased before Martinmas; the Lords sustained action for the whole year's duty, which the land might have paid, if it had been farmed. *Durie, 14th December 1621, M'Math contra Nisbet.* — A gift of single escheat extending only to moveables belonging to the rebel at the date of the gift, being granted in August, was found only to comprehend the half of that year's rent, except for such part of the lands as was in the rebel's own hands in manfing, of which the whole crop was found to be carried by the gift, even as it would have belonged to the rebel's executors, if he had died at that time. *Durie, 2d February 1627, Somervell contra Stirling.* — Liferenters have right to the crop of lands sowed by themselves, whether they attain to the term of Whitsunday or not, neither are they liable to any duty therefore. *Stair, Gosford, 25th July 1671, Guthrie contra Ld. of M'Kerston.* Gosford adds, That this was sustained in respect of the custom and former practice, but he observes, That it was unreasonable, because, allowing the liferenter's representatives the benefit of the labouring and sowing, they ought still to be liable for the rent, like any ordinary tenant. --- In a competition, between a donatar of single escheat, and a donatar of life-rent-escheat, with regard to the crop of the ground in the rebel's own manfing and labouring, growing at the date of the gift; the Lords preferred the donatar of single escheat, in respect his possession and intro-mission was before the donatar of life-rent-escheat had raised his declarator; and that it seemed to agree with the decision marked by *Durie, 2d February 1627, Somervell contra Stirling.* Tho' the president differed and thought, That tho' the donatar to the single escheat had right to the crop, he ought to be accomptable for the rent to the donatar of the life-rent-escheat, in the same way that a donatar of single-escheat of a tenant will be liable to the master. *Fountainhall, 23d February 1693, Lockhart of Cleghorn contra Watson.* --- In a question betwixt the heir and executor of a defunct tenant, it was found, That the executor had right to the crop sowed after, tho' laboured before the tenant's death; and it was remitted to the Lord ordinary to hear parties upon this point, who should be liable for the rent. *June 1730, Wotherspoon contra Lang.*

FOUND, That the fruits of an ecclesiastick person's benefice being separated from the ground by shearing, stacking, &c. the same belongs to his executors. *Balfour, (Executor) 2d January 1566, Abbot of Kilwinning contra Friar Johnston.* --- Found, That a prelate having right to teind-sheaves, if he live till the corns be shorn, altho' he die before Martinmas thereafter, and even before leading of the corns, yet the whole teind-sheaves will pertain to him and his executors, and not divide as in farms and other duties, where the party deceasing before Martinmas leaves only to his executors the half of the year's duty; but this was found not to hold in teind-sheaves, where the party having right may lawfully lead immediately after shearing; so that here neither Martinmas, Whitsunday, nor the time of leading, but the time when the person hath in law right to lead, is considered. *Durie, 21st March 1628, Murray contra Intrometters with teinds.* --- Ministers have right to their stipend termly; if they enter before Whitsunday they have right to the whole year, if after Whitsunday

Rents of a benefice or stipend current at death or removal, whether to the last or present incumbent?

and before Michaelmas but to the half. Stair, 24th June 1662, Weemyss *contra* Cuninghame. Stair, Gilmour, 17th June 1664, Hay *contra* Collectors of the vacant stipend. — If a minister die or be removed after Michaelmas, he has right to the Michaelmas term. Stair, 9th July 1663, Kirkaldie *contra* Balcanquell. — But where he is removed before Whitsunday, he has no right to any part of the stipend payable for that year. Stair, 2d, Gosford, 4th December 1671, White *contra* Gemmil. — A minister after he was transported continued to preach till March, his successor was not admitted till August; in a competition betwixt them for the half year's stipend, the Lords preferred the transported minister, seeing nothing was alledged for the collector of the vacant stipends, who, 'tis like, might have excluded both; for at Whitsunday neither of them was in *officio* or *beneficio*. Stair, 26th January 1670, M'Queen *contra* Marquis of Douglas. See Gosford, June 1670, Lautie *contra* Galbraith. — A bishop being deprived in June, (upon a simple letter from the King, but no sentence of a judge against him) and his successor not entering till Martinmas, so that the first had not served till the legal term of Michaelmas, and the other no part of that half year; in a process betwixt them for the said half year's revenue, the Lords preferred him who had been deprived in June, tho' there was a gift of that half year blank in the name sent down by the King, in whose hands the said half year's revenue was alledged to be. Fountainhall, 26th February 1687, Feuars of the bishoprick of Dunkeld *contra* Dr. Bruce. — Found, That a beneficed person demitting before a legal term, can have no right but to the preceeding term, tho', if he had died in possession, his representatives would have had right to the following half year as annat. Gosford, 21st July 1675, Archbishop of Glasgow *contra* late Archbishop. — Found, That a minister had right to the half year's stipend preceeding Whitsunday, having served the cure till after that term, tho' he had received collation and institution to another church before that Whitsunday, which gave him right to the half year's stipend of that church also. Home, February 1683, Blair *contra* Lady Halyards. — A minister having been turned out of his charge in January for not taking the test, was found to have no right to the Whitsunday's term's stipend thereafter. Home, February 1685, Home *contra* Galbraith. — Found, That an incumbent had right to the last half of the year's stipend, having been admitted to another church after Michaelmas, tho' during all that half year he resided not at the church from which he was transported. Fountainhall, 2d July 1697, Coupar *contra* Earl of Roxburgh.

FOUND, That the quotes of testaments that were not confirmed, did neither fall under the bishop's executry nor the annat, but only the quotes of such testaments as were confirmed either in the bishop's lifetime or during the annat. Dirleton, 12th November 1674, the executors of the late bishop of Edinburgh *contra* the present bishop. Stair, Dirleton, 6th July 1676, Bishop of Edinburgh *contra* Wihart.

Current rents,
how they di-
vide betwixt
purchaser and
seller?

A CONTRACT of alienation being made four or five days before Martinmas, containing procuratory of resignation, but making no mention of that term's mails, nor of the buyer's entry to the lands; the Lords found, That seeing the contract preceeded the term, altho' the sasine followed not till after it was past, the feller was denuded of his

his right, and could not pursue for that term's duty which was not reserved to him therein. Durie, 17th July 1629, Caldwell *contra* Stirk. — Where a tenant enters at Whitsunday and pays a year's rent at Martinmas thereafter, it is understood to be for the grass crop of that year, and for the corn crop the year following, which completes the year's possession; and therefore it is, that, if he remove next Whitsunday, he has the corn crop of that year free to himself. Upon this footing, a purchaser entering at Whitsunday was found to have no interest in the crop then sowed, nor in the tack-duty payable therefore, which, by the tack, was payable the Martinmas preceeding. Stair, 22d February 1670, Murray *contra* Drummond.

A COMPRISING upon a denunciation after Whitsunday, tho' perfected by infeftment before Martinmas, carries only right to the half of the rent for the crop on the ground; and therefore an arrestment of that year's rent, tho' posterior to the denunciation, is preferable for the other half, tho' the whole, as being victual-rent, be not payable till between the Yule and Candlemas after the comprising. Durie, 16th February 1633, Harper *contra* Cockburn. — But a denunciation having past before Martinmas, the legal term, and the decret of comprising before Yule, the conventional term; in a process of mails and duties against the debtor himself *qua* possessor, he was found liable for that year's crop, the same being *in medio*. Durie, 11th July 1629, Moncrief *contra* Balrounie.

IN a competition betwixt the heirs and the executors of a defunct, the first claiming the whole, and the other the half of the current year's crop, because the defunct deceased upon Whitsunday at 11 a-clock; the Lords found, That the half belonged to the executors, because the defunct was living till Whitsunday at 11 a-clock, and it was lawful for the tenants to have made payment of their Whitsunday's mail that day in the morning. Hope, (*Succession*) 21st February 1609, Ld. Merchiston *contra* his brothers. — A liferentrix living till the afternoon of Martinmas, the Lords found, That the said term now begun to run belonged to her executors, and not to the fiar. Durie, 16th February 1642, Lady Brunton *contra* . — A liferentrix dying in the forenoon of Martinmas day, and the question arising, whether her executors could claim that half year as due, it was found, That the liferentrix attaining any part of Martinmas day, her executor had right to that half year. Fountainhall, Dalrymple, 8th December 1704, Paterson *contra* Smith.

IN a competition betwixt the heir and executor, with regard to bygone annualrents due upon heretable bonds secured by infeftment, which the executor claimed down to the day of the predecessor's death, as due *de die in diem*; the Lords found, That where the annualrents, by conception of the bond, were made payable at Whitsunday and Martinmas, the same did belong to the heir from the term preceeding the predecessor's decease, which in the present case was Martinmas, the predecessor having died 1st May; but they found, That where the conventional terms of paying the annualrents were Lammas and Candlemas, the annualrent due at Candlemas before the predecessor's decease did belong to his executors. The foundation of which last opinion was, That where it is said that the legal, and not the conventional

Betwixt debitor and adjudger.

Dies incaptus pro completo habetur.

Quando dies credit of annualrents of heretable bonds?

terms, are the rule betwixt heir and executor, the meaning is, that the postponing the legal term by the convention of parties does not deprive the executor of the benefit of the legal term, *dies cedit etsi non venit*; but if by the convention of parties the fruits be payable before the legal term, the executor must have the benefit, because there *dies & cedit & venit*; and the case would be the same in a forehand payment of rents of lands. 6th November 1739, Competition betwixt the heirs and executors of Sir James Rothead.

T E S T A M E N T.

Testament may subsist without nomination of an executor.

IN a testament, a blank left for the executor's name was forgot to be filled up; it was found, That the want of the nomination of the executor or universal legatar, did not hinder but that the defunct might in any way dispoise his moveables in testament or in death-bed to stand valid as a legacy, which, by our law, may consist without nomination of executors, but will extend to the defunct's part only of the moveables. Stair, Gosford, 13th July 1670, Daughters of Soutray *contra* the eldest daughter.

Where the executor's name was filled up after the testator's death.

A TESTAMENT was found null, where the name of the executor and universal legatar was filled up after the defunct's death, tho' it was offered to be proved, That when the defunct subscribed the testament he did nominate his eldest daughter executrix and legatrix, and gave warrant to the notary to fill up the name, which, tho' neglected then, was done since; for our law allows of no nuncupative testaments, and therefore, if the executor's name be not filled up before the defunct's death, his will is not perfected in writ, and of consequence ineffectual. Stair, Gosford, 13th July 1670, Daughters of Soutray *contra* the eldest daughter.

Executor may be burdened in a testament to pay heretable debts.

IF he who, by contract, is obliged to infest a man in an annualrent, and to pay, as well not infest as infest, ordain, in his latter-will, his executors to pay the said sum with the readiest of his goods for his heir's relief; the Lords found, That the creditor may pursue the executor for it, in respect of the testamentary destination, altho' the debt of its own nature was not moveable. Haddington, 27th December 1606, Lord Lindsay *contra* Ld. Pitmillie.

But not the heir to pay moveable debts.

A MAN, by testament, having named his wife executrix and universal legatrix, with a special clause, That she should be free from paying any of his debt; this was not found to prejudice the heir of his relief of the moveable debts, it being pleaded, That no deed done in testament or *in lecto* can prejudice the heir. Stair, 14th December 1664, Lady Colvil *contra* Lord Colvil.

Heretable bond granted in a testament.

A BOND being made by a husband in his testament to bestow money upon lands, and infest his wife in a liferent thereof, altho' the said testament was not made on death-bed, (the husband having lived long thereafter, and made voyages out of the country) yet the bond was found null because granted in testament. Haddington, 21st June 1605, Jack *contra* Gourlay.

A LEGACY

A LEGACY of an heretable subject contained in a testament, found null. Stair, 21st February 1663, Wardlaw *contra* Frazer. — A disposition of lands in a testament is ineffectual. Stair, 13th July 1670, Daughters of Soutray *contra* the eldest daughter. — An heretable sum given up by a defunct in his testament as moveable, was found not to prejudice the heir. Durie, 25th July 1634, Crawford *contra* Matheson.

Heretable subject conveyed in a testament.

A PAPER being sign'd by a party going beyond seas, disposing upon heretage, but in its narrative beginning with the common stile of testaments, and yet giving power to the party to enter, and obtain confirmation from his immediate superior, excluding his heirs of line and all others, yet so far making it a *donatio mortis causa*, that in another clause it is declared, That if he return home it shall be leifom for himself only to revoke the said writ; and he having returned and deceased without making any revocation, the Lords found the writ not to be of a testamentary nature. Stair, 31st January, Dirleton, 14th November 1667, Henderson *contra* Henderson. — A person in *liege poustie*, made a total settlement of his estate by disposition, whereby he conveyed in general all his effects heretable and moveable in favours of his wife in liferent, and of his grand nephew in fee: In the same deed he conveys his whole moveables in favours of his wife, in case she should survive him, and names her sole executrix; after this he leaves several legacies, and lastly reserves to himself a power to alter, and there is a clause dispensing with the not delivery: In a reduction of this deed at the instance of the heir, it was alledged to be null, in so far as concerns the heretable subjects, because it was a deed of a testamentary nature, since the wife was named executrix in it; and, according to the opinion of my Lord Stair, deeds by testament, tho' done in *liege poustie*, have no more effect than on death-bed. Answered, The deed is nowise of a testamentary nature, nor nowise a testament, in that part of it which conveys the heretable subjects, but is a plain disposition *inter vivos*, made in *liege poustie*; and there is nothing in law to hinder the adjecting of a clause naming an executor in the most formal disposition of lands, yea it has been known done in a contract of marriage; and why a disposition and a testament may not be in one paper, as well as in two different papers no good reason can be assigned. The Lords assilzied from the reduction. 11th July 1733, Douglas *contra* Allan. — A testament being executed in *liege poustie*, with the common preamble usual in such deeds, nomination of an executor, burden of debts, &c. the following clause is adjected, "Which several debts and expences of my funerals, I hereby appoint the said Sarah Brand to pay out of the first end of her intromissions as executrix; and for the better enabling her so to do, I hereby make, constitute and ordain her, her heirs and donatars my cessioners and assignees in and to the principal sum of L. 500 Sterl. heretably secured upon the estate of Bransfield." In a reduction of this testament by the heir, in so far as concerned the heretable subject, the defence was, That nothing hindred a testament and assignation *inter vivos* to be upon the same paper. Answered, Where the deed is principally intended to be a disposition or conveyance *inter vivos*, it will be effectual, tho' a nomination of executors or other testamentary clause be adjected: But where the deed appears to be a formal

Whether understood a testament or deed *inter vivos*, or both.

mal testament, there a conveyance of heretage is inept, if fixed law and practice is to be the rule. And one reason is, That a testament, at whatever time executed, has no effect but as being the last-will of the defunct; it is therefore construed in law to be the deed of the latest minute, equally as if it bore that date: And so testaments, from the nature of the thing, must be ever subject to the law of death-bed. It is otherwise in deeds *inter vivos*, which, tho' not delivered, are understood to be valid of their date, subject indeed to revocation or alteration; and if valid of their date, they must be safe from the challenge of death-bed, where executed *in liege poustie*. The Lords sustained the reason of reduction. 4th December 1735, Brand *contra* Brand.

Reduction
of testaments.

A TESTAMENT was reduced, it having been proved by the writer's oath, That it was not read over to the defunct at signing; nor was there any evidence, save the writer's own assertion, that he got any instructions from the defunct in what terms to draw the testament, so that the whole resolved upon the writer's faith alone. At the same time it was proved, That the defunct, some few hours before the testament was executed, had dictated a scroll of the particulars of her will, which differed in many articles from the testament. 15th November 1735, Petrie *contra* Lithgow. — A testament was reduced solely upon this footing, That the order for drawing the testament was in May, that it was signed no sooner than August, and yet was not read over to the party, tho' he was at that time of sound judgment. Fountainhall, 7th February 1695, Lady Arthbutnot *contra* her Tutors.

A WOMAN in her last moments having executed a revocable disposition in favours of her husband, but thereafter having sent for her nearest of kin to talk to him about the deed, and finding it abstracted by her husband, she fell into a passion, fainted away, and did not recover: In a reduction upon this head of the civil law, *si quis aliquem testare coegerit vel prohibuerit*, the Lords found it relevant to annul the disposition in so far as conceived in favours of the defender, that he did unwarrantably abstract the disposition from the defunct, and refused to exhibit it, that it might be read and reconsidered, and cancelled or revoked as she should think fit; which was found, tho' it was not alledged that she had given any orders to execute a revocation. Dalrymple, 4th November 1704, Buchanan *contra* Paterfon.

A TESTATOR, within a quarter of an hour of his death, having subscribed to the testament his christian name, and half of his surname, which in all was but a dissyllable, and then fainting, so that the writer holding him by the wrist, helped out the rest of the name; the Lords reduced the testament. Forbes, 14th, Fountainhall, 15 July 1710, Moncrief *contra* Monypenny. — One Hopkins intending to dispose of his effects to his relict, upon death-bed caused write out a testament, but after it was read over to him in usual form, he became so weak as not to be able to subscribe more than the three first letters of his name; however the witnesses having subscribed, and given their affidavits upon the true matter of fact in support of the writ, the will was approved of in the prerogative court of Canterbury, and the relict appointed executrix, administratrix, &c. Upon this title having pursued for a debt owing to her husband in Scotland, the Lords refused

fused to sustain the testament for above L. 100 Scots. December 1728, Mary Hopkins *contra* Duke of Athole. ---- An assignation of bygone annualrents made by one *in articulo mortis* found null, in respect it was proved by the witnesses insert, that the assignation was not read to the cedent before he signed it. Marcus, (*Assignation*)

February 1688, the children of Young *contra* Anderson. — In a reduction of a testament, the witnesses deponing, That the testator's physician, who was named universal legatary, having pressed the said defunct to make his testament, he shifted and delayed him for some time, but at last yielded to his importunity; and that the doctor from the defunct's mouth wrote down the names of the legataries, and quantity of their sums, and when he intended only a certain sum for his sister, pursuer of this process, the doctor persuaded him to make it twice as much; and that he asked the defunct whom he was to trust to see all this done and performed, and to be executor, and he answered, *None but yourself*, but the witnesses heard no mention of making him universal legatary, and that they knew not whether he heard or not, and that he commonly answered in the affirmative to what was asked; and that he could not hold the pen well, and died within a quarter of an hour after. The Lords annulled and reduced the testament, and ordained the notary to be cited to appear before them, to answer for malversing in his trust; and this to deter others from imposing on people when dying and insensible. Fountainhall, 16th 1699. And thereafter their Lordships fined the notary in 100 merks for the use of the poor, and appointed him to ly in prison during their pleasure. 2d December 1699, Chalmers *contra* Chalmers.

CONVEYANCE of an heretable subject in testament, if it infer an obligation upon the executor for the value? See Quod potuit non fecit.

T H I R L A G E.

IN a declarator of thirlage it appeared, That the pursuer's mill and the defender's lands had been both the King's property at the same time; That the lands were feued out anno 1535, *cum molendinis & multuris* in the *tenendas*; That the mill was feued out 1541, with the multures of the defender's lands *per expressum*. The defence was, That the King could not astrict the defender's lands after they were feued out, and therefore the charter of the mill can signify nothing, unless an antecedent thirlage could be qualified; and to make out this, 'tis not sufficient that it was the King's mill, otherwise most of the lands in Scotland behoved to be thirled, all the lands and most of the mills having been at some time or other the Sovereign's property; to make out this antecedent thirlage, possession must also be proved of multures while the mill stood in the King's person. Answered, Possession is not necessary where the thirlage is constitute by writ; beside, the tenants of the defender's lands are proved to have

How constituted?

gone some years to the mill about 40 years ago, tho' they performed no services, and paid only, as strangers, a peck of six firloths, and this possession must be presumed *retro*. The Lords found the defender's lands thirled to the pursuer's mill, but liable only to pay a peck of six firloths. Fountainhall, Forbes, 24th November 1708, Halkerston of Rathillet *contra* Melvil of Mordecarnie.

IN a process for abstracted multures at the instance of the Lord Maxwell, as proprietor of the mill of Clouden, against his feuars, the Lords, in respect the mill of Clouden and the defender's lands were part of the ancient barony of Holywood, pertaining to the abbacy of Holywood, and of the defenders their coming immemorially to the mill of Clouden, and paying the high insucken multure, and performing services, found the lands astricted to the said mill. In the reasoning the court was of opinion, That the coming to a church-mill, without any constitution in writ, is as effectual to constitute a thirlage as the coming to the King's mill, notwithstanding that the contrary had been formerly determined, which was thought to be erroneous. In this case the defenders lands were church-lands; yet the Lords were of opinion that this made no speciality; for the ground of the decision lies in this, That churchmen being presumed to have lost their rights at the reformation, the law did presume the same from a 13 years possession before the reformation, which afterwards, when it came to be impracticable to prove possession before the reformation by witnesses, was by act of sederunt, 16th December 1612, altered into 30 years possession after the reformation; and therefore 30 years possession after the reformation was in all views held equivalent to a title in writing. 22d January 1740, Maxwell fiar of Nithsdale *contra* Portioners of Holywood.

INFESTMENT of a mill granted by a bishop, bearing a general clause *cum multuris*, but no express astriction of the defender's lands; this join'd with a precept from the bishop, ordaining his tenants to pay their multures to the said mill, was found a sufficient constitution of a thirlage from which the defender could not be exempted, tho' he was afterwards infest by the bishop in his lands *cum molendinis & multuris*. Here it was pleaded, That the precept being without consent of the chapter, could not be extended beyond the bishop's life, it not being in a bishop's power, without consent of his chapter, to dilapidate his benefice. Stair, 7th December 1665, Veitch *contra* Duncan. — A charter of a mill being granted by a bishop *cum molituris*, of lands lying within his diocese, anterior to feu-charters of these lands in favour of others, bearing the *reddendo* of a feu-duty *pro omni alio onere*, and explained by another charter of the mill *cum astrictis molituris* of the same lands, posterior to the charters of the lands; this was found to constitute a thirlage, notwithstanding the intervening feu-charters *pro omni alio onere*, which the Lords found were not *media impedimenta*, to hinder the last charter of the mill to explain the first. Forbes's MS. 23d February 1714, Feuars and inhabitants of Old Aberdeen *contra* Frazer.

HE who has set rentals of lands to his tenants for a certain duty, may notwithstanding thereof set a tack of his mill, with the thirle multures of the barony, by virtue whereof the rentalers and remanent tenants will be astricted to bring their corns to the mill, and pay thirle multures

multures therefore, agreeable to the custom of the barony. Haddington, 16th January 1611, Affleck *contra* Hamilton.

THE abbot of Scoon having feued the mill, with the astringtion of *omnia grana crescentia* used and wont, afterwards feued some lands, which at the feuing of the mill were in his own mansing and parking; the Lords found these lands could not be repute astringted, seeing *res sua nemini servit*. Marcus, (*Multures*) 2d February 1686, Lady Kincarrachy feuar of the mill *contra* Viscount of Stormont.

THE services of leading millstones, repairing the dam, and other services about the mill, are implied in every sort of thirlage, and go along with the thirlage to purchasers, tho' not expressed. Durie, 17th July 1629, Ld. Newliston *contra* Inglis. — Constitution of thirlage, with multures and sequels, does, by the nature of the right, give the ordinary mill-services, such as, for upholding the mill and dam, bringing home millstones, &c. and that without relation to possession, so that immediately upon the constitution these may be demanded. Stair, 27th February 1668, Maitland *contra* Leslie. — There being a bond of thirlage, astringting lands to a mill, not as to *omnia grana crescentia*, or *inveſta & illata*, but only for what grain they should grind for the use of their own family, and not mentioning the smaller services, of helping home with millstones, repairing the mill-dams, &c. and the question being, whether these were to be understood as included; it was found, That the bond of astringtion carried all the lesser burdens and services along with it, tho' not expressed. Fountainhall, 20th June 1696, Dow *contra* Burt. — Heretors thirled to a mill, and who had also been in constant use of repairing the dam, and bringing home millstones, pleaded exemption from the other services, such as, the carrying materials for reparation of the mill-house, which had always been repaired by the heretor or millar, without any burden upon the sucken. And it was alledged, That the right to the thirlage being constitute by prescription, *tantum præscriptum quantum possessum*. Answered, Services are implied in the nature of thirlage, whatever way constituted. The heretor of the mill was found to have right to the services of carrying materials by the sucken, for supporting the mill-house. 16th December 1732, Crawford *contra* Halkerston.

THE Lords found the knaveship, and other small services, as well due as the multure, notwithstanding the contract of astringtion, which was neither taxative nor exclusive. Fountainhall, 22d July 1697, Malcolm *contra* Rutherford.

IN an action of abstracted multures, the Lords sustained the action for the knaveship, lock and bannock, as well as for the multures abstracted, altho' these small duties are only paid for service, which (as the case stood) the defenders neither got nor could get; the reason was, because the pursuer's right was to the whole multures, *cum eorum sequelis usitatis & consuetis*, and that they were in use to pay these duties before, and that the pursuer behaved to keep servants at the mill to serve them when they came. Durie, Hope, Spotiswood, (*Mills and Multures*) 22d March 1628, Adamson *contra* Tenants. — The like. Gofford, 26th January 1672, Campbell *contra* Campbell. *Nota*, This seems

Mill-services implied in every sort of thirlage.

Knaveship, &c. may be demanded in an action for abstracted multures.

to have been formerly otherwise decided according to Haddington.
February 1610, Mar *contra* Ker.

Thirlage of
*omnia grana
crescentia.*

A GENERAL astringion of lands to a mill, not mentioning either *grana crescentia*, or any words relative to the grain growing on the land, but specially expressing the name of the lands, and adjecting the words, " And siklike, with all corns inbrought by the possessors " of the said lands which should happen to be grinded, " was found to import an astringion of *omnia grana crescentia* upon the lands, tho' the possessors of the lands had been in use immemorially to dispose what they pleased of the growing grains without grinding them at any mill, and tho' the words, *which should happen to be grinded*, might bear relation to the growing grains, as well as to these inbrought. Durie, 26th June 1635, Ld. of Waughton *contra* Home.

If teind be
comprehended
in such a thir-
lage ?

IN a constitution of thirlage, even when it is of *omnia grana crescentia*, the heretor of the servient tenement is never understood to astring the teinds, where they do not belong to himself but to a titular ; and tho' afterwards he purchase the teinds of his own lands, this will not alter the case, or subject the teinds to the astringion which were originally free. Durie, 7th July 1635, Ld. Innerwick *contra* Hamilton. ---- The like. Balfour, (*Mills*) 12th July 1565, Ld. Forthir *contra* Tenants of Freuchie. Durie, 21st March 1637, Cuthbert *contra* Town of Inverness. Dirleton, Stair, 7th June 1676, Ld. of Pittarro *contra* Tenants of Redmire. Fountainhall, 18th November 1697, Gardin *contra* Watson. ---- Otherwise where the teind originally belonged to the person who constituted the thirlage. Fountainhall, 14th November 1707, Ld. Newmains *contra* Ld. Bemerfide. --- Where teind is not drawn or paid in kind to the titular, but in money, it is liable to multure as the stock is. Marcus, (*Multures*) March 1682, Duff of Braco *contra* Abstracters. See Stair, 14th January 1662, Nicolson *contra* Feuars of Tillicultry. ---- Teind not being *decimæ inclusæ*, or converted or valued to money, ought to be free of multure. Marcus, (*Multures*) 20th July 1688, Countess of Rothes *contra* Thomson of Mildean.

If feed-
corn ?

UNDER a thirlage of *omnia grana crescentia* feed-corn is not comprehended. Balfour, (*Mills*) 12th July 1565, Ld. Forthir *contra* Tenants of Freuchie. Durie, 21st March 1637, Cuthbert *contra* Town of Inverness. Stair, 21st January 1681, Grierson *contra* Gordon. Gilmour, 3d January 1662, Stewart *contra* Abstracters of multures. Stair, 14th January 1662, Nicolson *contra* Feuars of Tillicultry. ---- The same, tho' the land and mill belong to different proprietars. Dirleton, Stair, 7th June 1676, Ld. Pittarro *contra* Tenants of Redmire. ---- The same in the case of an exient tenant, who was to sow no more corn upon the lands belonging to the proprietor of the mill. Fountainhall, 18th November 1697, Gardin *contra* Watson.

If horse-
corn ?

MULTURE is never due for horse-corn. Gilmour, 3d January 1662, Stewarts *contra* Abstracters of multures. Stair, 14th January 1662, Nicolson *contra* Feuars of Tillicultry. Stair, 21st January 1681, Grierson *contra* Gordon. Fountainhall, 18th November 1697, Gardin *contra* Watson.

UNDER

UNDER a thirlage of *omnia grana crescentia*, the farms payable to the master *ipsa corpora* are not comprehended. Balfour, (Mills) 12th July 1565, Ld. of Forthir *contra* Tenants of Freuchie. ---- But if payable in meal they are comprehended. Durie, 11th July 1621, Keith *contra* Tenants of Peterhead. Marcus, (Multures) 13th June 1688, Countess of Rothes *contra* Thomson of Mildean. ---- And farms payable in kind are comprehended, where, at the constitution of the thirlage, the lands and mill belonged to different proprietars. Dirleton, Stair, 7th June 1676, Ld. Pittarro *contra* Tenants of Redmire. Fountainhall, 18th November 1697, Gardine *contra* Watson. ---- Lands having been once in the King's property, and now feued out, but thirled to another mill, the Lords at the first found the master's farm simply free of multure, whether he consum'd it in his own family or not; because while the lands were in the King's property his rent was multure free, and so should the rent of his vassals and feuars, unless they actually laboured some of their lands. Fountainhall, 7th, Forbes, 19th January 1709, Halkerston *contra* Melvil. ---- But thereafter this exemption was restricted to what the master consumed not; but if any part of it was consumed in his family within the thirle, they found that liable. Fountainhall, 1st February 1709, *inter eosdem*. ---- The next question being, If the tenant had any superplus bolls more than paid his rent, and sold them in the mercat to buy oak and iron, whether that excrese should be liable in multure? and it was found, That it was not, seeing multure-duty is truly *pro molitura*, and these being relatives, *mutuo se ponunt & tollunt*, and if he have no use for it in maintaining his family, but only to pay his country debts, it ought not to be subject to multure. Fountainhall, *ibid*. ---- Forbes adds, That if the tenants, by reason of the scantness of the crop, not having corn sufficient for the maintenance of their families, be obliged to buy for that use, the bought corns are free of astrictiion, but that they could not elide the thirlage by selling the *grana crescentia*, and buying meal to maintain their families. 19th January 1709, *inter eosdem*.

BOLLS payable to hinds and servants not exempted from multure. Fountainhall, 28th February 1684, M'Dowall *contra* M'Culloch.

If servants
bolls?

IN a thirlage to the mill of a barony constituted by long possession, allowance was claimed by the feuars of as much corn as would pay the feu-duties, minister's stipends, and publick burdens, because they behoved to sell corn for satisfying these, and in so far the corns were not their own; this was repelled. Stair, 14th January 1662, Nicolson *contra* Feuars of Tillicultry. ---- The abbot of Scoon having feued his mill, with the astrictiion of *omnia grana crescentia*, used and wont; the Lords found, That the feu-duty of 20 chalders of victual, payable to him by his other feuars, was not liable to astrictiion, altho' there was a conversion in money at the vassal's option, unless a contrary custom were proved; and that they would not require 40 years possession, but a competent number of years, being only to clear the import of the clause of astrictiion, used and wont. Marcus, (Multures) 2d February 1686, Lady Kincarrachy *contra* Viscount of Stormont.

If corn for
paying the
stipend, feu-
duty, &c.

THE thirle multure must be paid as well for bear as for other grain, where all corns grindable are contained in the first constitution of the

Thirlage of
all corn grind-
able.

thirlage. Haddington, 10th July 1605, *contra* . —
 A clause being inserted in feuars charters, "Obliging them to come to
 "a certain mill, with all grindable corns growing upon their lands
 "which they should happen to grind, and pay multures, and perform
 "mill-services used and wont, and also to grind thereat all other corns
 "imported within the bounds of the said lands for outfucken mul-
 "ture;" found, That this thirlage extended to all grindable corns
 growing upon the astricted lands, in so far as necessary to the con-
 sumption of the families within the thirle; but found, That the su-
 perplus of the growth of the ground may be freely exported, and that
 if the *grana crescentia* are not sufficient for their consumption, what
 is imported for that end must pay outfucken multure. Forbes, 22d
 July, and 23d December 1709, Feuars of Dundaff *contra* Madrill. —
 A clause of thirlage, astricting "the haill grindable grains growing
 "upon the lands," was not found equivalent to a thirlage of *omnia*
grana crescentia, importing only, that no part of the defender's grain
 is to be grinded by them at any other mill than the pursuer's, and that
 all necessities for the family, or for payment of the masters or superi-
 ors rents, in so far as payable in meal, is to be grinded at the pursuer's
 mill. February 1731, Lockhart *contra* Paterfon. — A clause
 in a vassal's charter, "bearing the vassals, and the tenants and posses-
 "sors of the lands, to be astricted to the superior's mill, and to carry
 "thereto all their grindable grains growing on these lands, which they
 "shall happen to grind," was found to be an astriction not only of the
 grain grinded for the necessary use of their families, but also of all grain
 growing on the lands which the vassals, tenants or possessors should hap-
 pen to grind for other uses, they being bound to pay therefore insucken
 multure, knaveship and bannock, as stipulated by the clause in the
 charter. 17th February 1736, Lockhart of Carnwath *contra* Den-
 ham of Westshields. But the Lords were unanimously of opinion,
 That the superplus of the corns not necessary for the consumption of
 the families might be lawfully exported in kind, in case they were not
 grinded, without being liable for any multure. — Gargunnoch, pro-
 prietar of the village of Saltcots, in the year 1703 feued out some
 houses, and some parcels of ground 40 or 50 foot square, adjacent to
 the houses, of no other use but to be kail-yards; and in the disposition
 and feu-rights "thirles the feuars to come to the mill of his barony
 "with their grindable corns and malt, and to pay the multures and
 "services conform to the use of the barony." The import of this
 thirlage being called in question, the feuars argued, That it imported
 only *grana crescentia*; the proprietor of the mill argued, That the na-
 ture of the subject points it out to be a thirlage of *inveſta & illata*;
 for nothing being feued out but a house and a small parcel of ground
 fit only for a yard, and that recovered from the sea, which even sup-
 posing it fit for tillage would not afford a handful of multure in a year;
 it must be no thirlage at all, or a thirlage of *inveſta & illata*. The
 Lords found the feuars liable in payment of multure, not only for all
 their grindable corns growing within the thirle, but for all other corns
 which they should bring into the thirle to be consumed there, and for
 all malt, whether grinded or not, brought in and brewed within the
 thirle; but found, That such corns and malt, imported only in the
 way of trade for exportation or sale, and not grinded or consumed
 within

within the thirle, are not subject to the payment of multures. 27th December 1717, Hamilton of Grange *contra* Millar and Auld.

In a thirlage of *inveſta & illata*, the grains inbrought ought not to pay multure, altho' they thole fire and water, unleſs alſo grinded there. ^{Thirlage of inveſta & illata.} Durie, Hope, (*Mills and Multures*) 11th July 1621, Keith *contra* Tenants of Peterhead. ---- In a thirlage expreſſed in the following terms, *Tam crescentes quam pervenientes ad eos sine exemptione qualecunque*, the Lords found, 1mo, That this did not ſubject all corns brought within the thirlage, but only ſuch as were to be grinded, ſo that they could not be grinded at any other mill for the uſe of the ſuckners, but that they might be ſold again, or otherwiſe made uſe of, without being ſubject to any duty, unleſs grinded as ſaid is by the ſuckners. 2do, They found, That this claufe did not bar the inhabitants from purchaſing meal. Durie, 23d March 1724, M'Kenzie *contra* Town of Elgin. ---- The inhabitants of a town who were thirled to the town mills by a thirlage of *omnia inveſta & illata*, having alſo land in tack from a neighbour heretor, whoſe tenants were alſo thirled, and they uſing to ſtack the corns growing on his ground with the other corns thirled to the town mills within the town; the Lords found, That the town's act of thirlage extended not to ſuch corns as were only ſtacked within the town, and tholed not fire and water therein. Spotiſwood, (*Mills*) 27th, Durie, 28th June 1628, Blackburn *contra* Burgeſſes of Innerkeithing.

A Fru being granted of a town's mill, "*cum aſtriſtis multuris omnium granorum inveſtorum & illatorum*, which ſhould thole fire and water within their territory;" It was argued, That this could reach to none but the corns that were grinded, not to malt or kiln-dried oats, transported perhaps in the way of commerce out of the country, tho' tholing fire and water; for *merces debetur pro opera*, and where none is grinded no payment ought to be: This thirlage, notwithstanding, was extended to all corns kilned and cobled, tho' they ſhould not be grinded any where. Durie, 21ſt March 1637, Cuthbert *contra* Town of Inverneſs. ---- The ſame again found, Gilmour, July 1663, Forbes *contra* Town of Inverneſs. ---- A thirlage of "*inveſta & illata*, tholing fire and water within the thirle," is underſtood of kilning and ſteeping or cobling only, not extended to brewing or baking; and therefore the inhabitants of the town were found not liable to pay multure for malt whether grinded or not, unleſs the malt were made by themſelves without the town, in order to diſappoint the thirlage, which would be *fraudem facere domino*. Harcus, (*Multures*) March 1682, Earl Caſſils *contra* Heretors of Maybole. ---- A thirlage of *inveſta & illata* tholing fire and water within the thirle, tho' ordinarily interpreted of ſteeping and kilning, not of baking and brewing; yet was found in this caſe, upon uſe and wont, to extend to malt brewed within the town, tho' not malted in the town or its liberty, but not to meal, becauſe as to that the proof was defective. Stair, 24th November 1680, Ramſay *contra* Town of Kirkaldy. ---- In a proceſs of thirlage at the inſtance of an hoſpital, againſt ſome brewers within a barony belonging to the ſaid hoſpital, the queſtion being about theſe words in their charters, That they ſhould bring to the mill "*omnia grana ſua quæ aquam & ignem patiuntur*"

infra dictas terras ibidem terenda & molienda,” the Lords found the feuars thirled, with regard to all ungrinded corns imported; but if the corn was grinded before it came within the thirle, that it was not liable to pay any multure to the mill of the barony. Fountainhall, Forbes, 22d February 1707, Heriot’s hospital *contra* Alves.

Thirlage of
corns neces-
sary for the
families use.

THE small feuars of a town being bound by their charters “to grind so much of their corns at their superior’s mill as should suffice for the sustentation of their families;” the Lords found, That if the feuars, who had no corns growing, bought corns, they ought to prefer their master’s mill; but they might buy meal as they thought fit. Marcus, (*Multures*) December 1686, Ld. Cockburn *contra* Feuars of Dunse.

General
clause *cum a-*
strictis multu-
ris regulated
by possession.

A BARON being infeft *cum astrictis molituris totius baroniæ*, the thirlage was so far understood to comprehend *inveſta & illata*, that use and custom was admitted to probation. Colvil, March 1588, Richardson *contra* Feuars of Musleburgh. December 1589, *inter eorſdem*. --- In a thirlage of *omnia grana crescentia*, found with respect to deductions, that neither was farm bear excepted, nor so much as the light corn given to the beasts that laboured the ground, nor the corns sold for buying cattle and other such necessities; because the pursuer offered to prove, That the inhabitants had ever been in use to pay multures for all growing corns, without any such abatement. Durie, 21st March 1637, Cuthbert *contra* Town of Inverness. --- Bear was found included in a thirlage of *omnia grana crescentia*, containing only an exception of seed and teind; and this found, tho’ from the constitution of the thirlage, now above thirty years, multure had not been demanded for bear. Gosford, 3d July 1673, Oliphant *contra* Oliphants.

Corns never
subjected to a
double mul-
ture.

A PROPRIETAR having established a thirlage of *omnia grana crescentia* in his barony, and of *inveſta & illata* into his burgh of barony, it was found, That the same corns, tho’ growing in the barony, and brought into the burgh, could not be subject to both duties. Home, 17th January 1722, Steedman *contra* Horn. — The contrary. Stair, 11th December 1678, Ramsay *contra* Town of Kirkcaldy.

Quantity of
thirle mul-
ture.

THE 13th part sustained as the quantity of multures, in respect of the custom of the rest of the barony; albeit the defender offered to prove that the possessors of his room had been in use, many years before, to get the corns grinded at the said mill for a less duty, which was only found relevant for bygones, but not in time coming. Haddington, 17th January 1610, Neilson *contra* Tenants.

Dry mul-
ture.

HE who is infeft in the lands for payment of his duty, and such a quantity *pro aridis multuris*, is free to carry and grind his corn where he pleases, paying the dry multures to his Lord contained in his infeftment. Haddington, 29th January 1612, Ld. Caskiben *contra* Clark.

Thirlage
implies no re-
straint from
turning the
ground into
grafs.

AN heretor who sets a tack of his mill, with astricted multures, incurs not the warrandice of his tack, tho’ his tenants, who are astricted, be not restrained by their tacks from turning their ground into grafs

grafs. Astricted multures are like teinds, a casual rent implying no restraint upon the persons subjected to manage their grounds in what shape they please, providing it be not done *in fraudem*. July 1731, M'Fadzen *contra* Earl of Cassils.

In case, at the time of the abstraction, the mill of the barony be not in condition to serve, the defender will be found liable for the multure, but not for the smaller duties due for service. Fountainhall, 28th February 1684, M'Dougal *contra* M'Culloch. — Insufficiency of a mill, as being a burn-mill, dry in summer, was not found relevant to free from abstraction, unless it had been an insufficiency through the pursuer's fault. Stair, 9th February 1666, Heretors of St. John's Mill *contra* Feuars. Insufficiency of the mill.

WHERE a superior, by an act of his own court, thirles all the barony, the Lords found, That such feuars as are infest *cum molendinis*, &c. prior to the said act, are not thereby bound. Colvil, 4th April 1576, Hoppringle *contra* Cairncrofs. — A feu of lands for a feu-duty *pro omni alio onere cum molendinis* in the *tenendas*, liberates from astriction, because the words *cum molendinis* are never put in the dispositive clause, unless where a mill is also disposed: This was found, tho' the pursuer got a posterior disposition of the mill with the thirle multures of these lands *per expressum*; and tho' the defender and his tenants had been in use to grind at the pursuer's mill, for the pursuer's author could not convey a thirlage after he had discharged the same; and the defender's going to the mill was to be looked upon, as a voluntary deed so long as there was no sentence against him for abstracted multures. Marcus, (*Multures*) 17th January 1682, Buntin *contra* Boid. — The like. Dirleton, 7th December 1665, Veitch *contra* Duncan. Marcus, (*Multures*) 1st December 1681, M'Pherson *contra* M'Intosh of Stroan. Home, December 1723, Ruffel of Gartness *contra* Waddel of Easter-Moffat. — The like, tho' there was a prior restriction in writing. Fountainhall, 26th January 1705, Graham *contra* Ure. — But the clause *cum molendinis & multuris* in the *tenendas*, with a feu-duty *pro omni alio onere*, was found not to liberate from astriction, where the charter was granted in terms of a prior obligation to grant the feu, but with an express astriction to the mill of the barony, which was not understood to be passed from by the charter; and this was found, tho' the charter did not refer to the obligation. Auchinleck, (*Mills and Multures*) 20th November. Durie, 20th December 1632, Hamilton *contra* Hamilton. — A feu being granted by the King bearing *cum molendinis & multuris* in the *tenendas*, this was not found to be a liberation from thirlage, being only in the *tenendas*, which passes of course, for when signatures are passed the King's hand or exchequer, they bear only *tenendas*, &c. without expressing the particular clause, which is afterwards extended at the seals. Gilmour, 3d, Stair, 8th January 1662, Stewart *contra* Feuars of Aberbadnoch. Fountainhall, 24th November 1708, Halkerston *contra* Melvil. Clauses importing a liberation from thirlage.

A FEU-CHARTER bearing a certain feu-duty *pro omni alio onere*, but not bearing a clause *cum molendinis & multuris*, imports not an exemption from thirlage. Durie, Auchinleck, (*Mills and Multures*) Hope, (*Ibid.*) 17th July 1629, Ld. Newliston *contra* Inglis. Durie, 26th November 1631, Oliphant *contra* Earl of Marischall. — The like,

like, tho' the charter bore also a clause of absolute warrandice. Bruce's MS. 4th December 1716, Monteith *contra* Feuars of Abbotscafs. June 1731, Stewart *contra* Waddel. See Stair, 7th December 1677, Henderson *contra* Arnot. Stair, 11th January 1678, Lord Balmerino *contra* Cockburn, where a feu-duty *pro omni alio onere*, was found to import a liberation from thirlage. --- One of the vassals of a barony having obtained his lands to be disjoined from the same by a disposition of the superiority in his own favour; the Lords, nevertheless, found, That these his lands, which had been formerly thirled to the mill of the barony, remained still thirled; and that the dismembration alone did not import immunity. Fountainhall, 4th February 1697, Chiefly *contra* Dalmahoy.

POSITIVE and negative prescription of thirlage. See Prescription.

GENERAL clause thirling all lands, how far extended? See General Affignation.

TITLE TO PURSUE.

In reductions of land-rights.

AN heir apparent cannot pursue reduction of an infeftment of property until he be served heir in general. Colvil, 12th January 1581, Tweedie *contra* Bell. Colvil, July 1592, Ld. Dowhill *contra* Ld. Kinfauns.

THE Lords refused to sustain action at the apparent heir's instance for reducing a disposition granted by his predecessor, unless the pursuer would enter heir, altho' this would make a passive title, and the event of the process was uncertain. Durie, 11th February 1635, Muir *contra* Muir. Durie, 16th March 1637, Ld. Edmonstoun *contra* Edmonstons.

AN apparent heir was found to have no interest to reduce an apprising led against his predecessor, unless he were served heir to him; but a general service was found sufficient, tho' infeftment and possession had been attained upon the apprising, seeing a special service cannot proceed while an infeftment of property stands in the way. Stair, 26th February 1681, Ld. Strowan *contra* Marquis of Athole. Durie, 12th December 1635, Rowan *contra* Wardlaw. — Where an adjudication proceeds against an apparent heir upon a special charge, the next apparent heir needs no other title to quarrel the adjudication, than a general service to him against whom the adjudication was deduced; because being served to a person against whom the decret of constitution was obtained, and thereby liable for the debt in the decret, he has an interest to quarrel the decret, and the diligences following upon it. In the debate it was moved, supposing the decret of constitution liable to no objection, whether the general service was a sufficient title to quarrel the adjudication upon nullities in the form of the adjudication itself, or if a special service was not necessary to the predecessor last infeft in the lands: But without much reasoning upon this, the general

ral service was thought sufficient to quarrel the adjudication, as well as the decret of constitution, upon whatever ground. 19th February 1740, Spreul *contra* Spreul-crawford of Cowdenhill. — Reduction of a disposition, whereupon infeftment has followed, may be pursued by the heir served in general, tho' not infeft, where the reasons of reduction are idiocy, death-bed or minority. Gilmour, 18th November 1664, Meikle *contra* Liston. — But in a reduction of the vassal's right by the superior's heir, the Lords refused to sustain process till the pursuer should be infeft in the superiority. Colvil, March 1581, Earl Glencairn *contra* Porterfield.

THE Lords sustained a general service as a sufficient title in a reduction to force the defender to produce his own and his author's infeftments, seeing the defunct, the pursuer's author, was not infeft on his comprising. Fountainhall, 18th November 1680, Stark *contra* Kincaid.

A NAKED adjudication without a charge, tho' a sufficient title in an improbation, is not sustained to call for production in order to reduction of any real rights, but only of personal rights where infeftment has not followed. Fountainhall, Marcus, (*Improbation*) 10th November 1683, Dundas *contra* Wallace. Marcus, (*Improbation*) 13th July 1688, Burnside *contra* Crawford. — An apprising with a charge, found a sufficient title of reduction, nor was it considered whether the legal was expired or not. Marcus, (*Improbation*) February 1683, Smith *contra* Hamilton. — The Lords found a charge against the superior upon an adjudication, sufficient to entitle the adjudger to reduce real rights clothed with infeftment, tho' the adjudication was led by a trustee to the behoof of an apparent heir upon his own bond, and he was not served heir and infeft. Forbes, 28th January 1713, M'Pherson *contra* M'Pherson. — An adjudication with a charge against the superior found a sufficient title in an improbation, because any having interest may propone false and feigned; but it was found not a sufficient title to insist in a reduction of real rights perfected by infeftment, no more than it would be to pursue a removing. Fountainhall, 24th January 1694, Keith *contra* Cathcart of Carbiston. Bruce's MS. 20th June 1716, Home *contra* Earl Home.

AN apparent heir cannot reduce an alienation made by his predecessor after interdiction. Haddington, 20th December 1593, Ld. Ruthven *contra* Crichton. In a reduction on ex capite interdictionis.

AN heretable disposition and infeftment of lands was found reducible upon an inhibition served on a naked personal bond, without any apprising following upon it, because the creditor must have access to remove the impediment that would hinder his comprising, or stop his obtaining a real right. Durie, 2d July 1625, Porteous *contra* Elliot. Durie, 20th January 1632, Halyburton *contra* Monteith. Dalrymple, Forbes, 17th February 1713, Kennedy *contra* Agnew. In a reduction on ex capite inhibitionis.

IN a process of reduction, at the instance of a personal creditor, against one who had a posterior disposition to the subject by the common debtor, the Lords found, That he, tho' only a personal creditor, had a sufficient title to reduce on the act of parliament 1621. Fountainhall, 10th December 1696, M'Kenzie *contra* Campbell. Reduction upon the head of bankruptcy.

Fountainhall, 17th January 1702, Forbes *contra* Earl of Aberdeen.
— The contrary. Fountainhall, Forbes, 24th June 1709, Brown
contra Brown.

In a reduction
ex capite
fraudis.

THE Lords found it not competent to an apparent heir to quarrel a deed elicited from his predecessor upon fraud and circumvention, until he be served heir to the person alledged to be circumvented. Forbes, 22d July 1713, Douglas *contra* Somervell.

If personal
creditors may
pursue reduction
upon minority
and lesion?

FOUND, That creditors of a minor might, *intra annos utiles*, intent reduction of deeds done by their debtor to his lesion in his minority, tho' he do not concur and revoke; that is, personal creditors might reduce personal rights granted by their minor debtor, and creditors, by real diligence against a minor's lands, upon debts constituted against him, might quarrel his disposition of these lands. Harcus, (*Minority*) 27th February 1685, Herbertson *contra* Stewart.

Reduction
ex capite lecti.

AN apparent heir of provision not retoured, found to have no right to pursue reduction of his predecessor's deed *ex capite lecti*. Durie, 16th March 1637, Ld. Edmonston *contra* Edmonstons. — An apparent heir can pursue reduction *ex capite lecti*. Stair, 23d February 1676, Apparent heir of Heriot *contra* his Creditors. — The Lords found no process in a reduction *ex capite lecti*, at the instance of persons deriving right from one in Ireland, as apparent heir to the grantor of the deed quarrelled, unless the pretended apparent heir's propinquity to him were instructed by a service or otherwise. Forbes, 23d July 1713, Gordon *contra* Campbell.

In a declaration
of recognition.

A DECLARATOR of recognition sustained at a donatar's instance, tho' having but a personal right, being founded upon the superior's right who was infeft. Stair, 28th January 1681, Ld. of Dun *contra* Scot.

In processes
upon the terce.

A SERVICE to a terce is a good title in a pursuit at a relict's instance for the third of the mails and duties, without an instrument of kenning; but that will be necessary in a real action, as in removing, or for apprehending possession of the ground. Durie, Auchinleck, (*Terce*) 15th March 1632, Relict of Veitch *contra* — A declarator of terce being obtained against the deceased husband's heir, action for the third part of the mails and duties was sustained against possessors of the lands, wherein the husband died infeft, tho' the relict was not kened, nay not even served to her terce. 26th January 1731, Fea *contra* Trail. — A terce is no title for possession until it be kened, and therefore an appriser pursuing tenants to remove, the relict was not found entitled to keep in possession, she not being kened to her terce. Spotiswood, (*Terce*) 1583, *contra* Stair, 3d February 1675, Barclay *contra* Scot.

In actions
recuperanda
possionis.

AN heir, tho' not served, may pursue for delivery of his predecessor's house, tower, fortalice, &c. Balfour, (*Heirs*) 2d December 1564, Scougal *contra* Scougal. — An apparent heir may continue his predecessor's possession, and being ejected, may pursue an ejection without being served heir. Colvil, July 1583, Gib *contra* Hamilton.

milton. ----- The like where his predecessor's tenants are ejected.
Dirleton, 18th July 1666, Steil *contra* Hay.

AN apparent heir of ward-lands will get a modification for his aliment, albeit he be not served heir. Haddington, 20th November 1610, Master of Boyd *contra* Ld. Carwell. Process for aliment.

THE heir of entail neglecting the deed of entail, and making up his title to the land as heir of line, having thereupon burdened the land with debts contrary to the terms of the entail, a process for disburdening the tailzied subject of these debts at the instance of the next substitute against the representatives of the said heir of entail, was not sustained without a service. July 1720, Lord Strathnaver *contra* Duke of Douglas. Process to disburden the tailzied estate of debts.

FOUND, That a personal bond to convey some lands contained in a charter, gave the pursuer interest to crave probation of the tenor of the said charter, altho' it was alledged, That a personal bond could not produce action for proving the tenor of a real right, unless some other action had been first moved upon the personal bond, which might in law produce a pursuit concerning the real right in the person of the granter of the bond. Durie, 15th February 1628, Master of Jedburgh *contra* Earl of Home. Probation of a tenor.

AN objection being made against the title of a pursuer of a process of sale, That it was only an infeftment of annualrent, which is but a servitude, whereas none can pursue but such a creditor as has a right of property; the Lords repelled the objection, tho' the infeftment was not over the whole but of a part of the lands. Fountainhall, 11th July 1699, Lermonth *contra* Gordon. — The Lords found an adjudication without infeftment of a bankrupt estate, for bygone feu-duties resting to the superior, a sufficient title in a process of sale at his instance. Forbes's MS. 27th January 1714, Duke of Gordon *contra* M'Pherson. — A process of sale of a bankrupt estate being intended upon an adjudication, with a charge against the superior; it was objected, That an adjudication without infeftment was no real right, and yet the act 1681, authorising processes of sale of bankrupt estates, allows only such a process to be carried on at the instance of a creditor having a real right. Answered, The words *real right* are here taken in a lax signification, and that an adjudication is designed also, is pretty evident from the preamble of the statute, which runs in these terms, "Considering that when estates and lands of bankrupts are affected with comprisings, adjudications and other real rights, &c." The objection was repelled, and an adjudication with a charge found a sufficient title to carry on this process. January 1729, Newton *contra* Anderson. — An adjudication without infeftment or charge, found a good title to carry on a sale of bankrupt lands. July 1731, Creditors of Robertson *contra* his Children. 7th February 1738, Auchterlony *contra* Sir George M'Kenzie. Process of sale of a bankrupt's lands.

THE Lords refused to sustain an inhibition of teinds at the instance of a man as heir to his grandfather, because he was not served the time Inhibition of teinds.

time of using the inhibition. Hope, (*Heir*)
contra Tenants of Partoun.

Glendinning

Process of
 exhibition.

A COMPRISER not infest cannot call for exhibition and delivery of charters and sasines of lands, nor such other real rights, but he may call for contracts, bonds, &c. the same being comprised. Durie, 10th March 1627, Dick *contra* Skeldon.

Process at
 the executor's
 instance.

LICENCE to pursue to an executor decerned, was sustained, altho' *omnium bonorum*. Hope, (*Executor*) 24th March 1619, Farquhar *contra* Law. — A general licence, without mention of any particular debt, was found null, altho' the pursuer's action was for a special debt. Durie, 23d July 1625, Weemy's *contra* Davidson. — The Lords found no process upon a decret of executry without licence or confirmation, altho' the action was only for exhibition of the bonds belonging to the defunct, to the effect they might be confirmed. Hope, (*Executor*) December 1622, Kirklands *contra* Rutherford. — An executor confirmed, getting a licence to pursue for a particular sum, not given up in the testament, and which came to his knowledge after confirmation; the Lords sustained the pursuit upon the licence, notwithstanding the confirmed testament, and altho' it was not eiked thereto, which was found unnecessary, because it was uncertain if ever the executor should recover the same; but ordained him to find caution to confirm and make forthcoming to creditors, &c. in case it were recovered. Durie, 21st January 1624, Ld. Carnoufie *contra* . — The Lords sustained process at the instance of an executor-dative *ad omiffa* decerned, and having licence, tho' not confirmed. Gilmour, Newbyth, Stair, 30th June 1665, Stevenson *contra* Crawford. Stair, 21st February 1668, Scot *contra* Lady Clerkington. — A decret at the instance of an executor-dative decerned, found null in a suspension, because it neither bore confirmation nor licence, albeit the charger offered, *cum processu*, to instruct that very debt had been (afterwards) confirmed. Durie, 19th December 1626, Stewart *contra* Commissar of Dunkeld. — A licence to pursue before the commissaries for a debt confirmed, was not found necessary, the executor having already confirmed other subjects before the same commissaries. Forbes, 10th January 1710, Bothwell *contra* Trotter.

At the in-
 stance of a ge-
 neral dispo-
 nce

A DISPOSITION *omnium bonorum* is a sufficient title *ad inchoandam litem*, tho' the dispoinee be not confirmed, and equivalent to a licence to pursue. Stair, 25th June 1663, Halyburton *contra* Lord Roxburgh.

APPARENT heir may pursue exhibition *ad deliberandum*. See *Exhibition ad deliberandum*.

IF he can pursue for rents. See *Heir apparent*.

MAY defend, tho' he cannot pursue. *Ibid*.

TITLE supervening after process. See *Cum processu*.

TITLE

TITLE requisite to reductions and improbations. See Improbation.

TRANSACTION.

THE Lords found, That a party may transact a contravention of lawburrows before, but not after raising the summons, that being to the King's prejudice. Haddington, November 1598, *Ld. Main contra Ld. Innes*.

A DECRET at an assigney's instance for the whole debt against a cautioner, being quarrelled by him in a suspension as *ultra* the pursuer's title, in so far as two of the four cautioners were discharged and excepted from the assignation; answered, *Res est transacta*, the defender having got an abatement of the sum decerned and the decret discharged; which the Lords found relevant. *Harcus, (Decrets)* March 1686, *Crichton contra Murray of Skirling*.

TRANSFERENCE.

A DEFUNCT donatar having in his own lifetime recovered a general declarator, action of special declarator was sustained at the instance of his representatives, without necessity of transferring the general declarator in their favours as executors. *Durie, 17th July 1629, Executors of Douglas contra Ld. Ednem. Transference active discharged, act 15, parl. 1693.* Active,

IN an action against magistrates for not taking a rebel, it is sufficient that the rebel's representatives be cited for their interest after his decease, without necessity of transferring the process against these representatives. *Durie, 26th March 1634, Dunbar contra Provost of Elgin.* — Where a party compearing for his interest, in a process, dies, there is no need of transferring. *Fountainhall, 28th June 1678, Baxter contra Braithwood.* — A father and a son being cited in an improbation, wherein certification was granted; but before extracting, the father deceasing, the Lords found no necessity of a transferring against the son. *Gosford, 26th November 1668, Hutton contra his vassals.* — A party, as also his eldest son, who had right to his estate with the burden of his debts, being both called in a declarator, That the estate so disposed should be liable in the terms of a contract to the debt now in question, and the father having deceased *pendente lite*, and the pursuer still insisting against the son; the Lords sustained process, and found no necessity of calling or transferring against the heirs of the father, tho' the son alledged he was only a singular successor. *Dirleton, 16th February 1676, Earl Dunfermline contra Earl Calendar.* — One of the creditors in a ranking deceasing, and the decret of ranking Passive,

being thereafter extracted without calling his heir, the Lords declared, That the same could not have the effect of a *res judicata* against him. Bruce, 16th June 1715, Nisbet of Dean *contra* Watson.

COMPARE Arrestment. Compare Assignment.

BEFORE what court competent? See Jurisdiction.

T R A N S U M P T.

A *SASINE* being insert in a famous notary's book, all written and subscribed by himself, and absolutely completed, except the witnesses names; the Lords found, That after the notary's death the party might summon the haver of the prothocal to exhibite, and the witnesses to compear and verify the *sasine*; which being done, the Lords ordained the said *sasine* to be transumed, and the witnesses to be insert therein. Haddington, 17th July 1595, Hart *contra* Guthrie.

A *COMPRISER* having obtained decret for delivery of the writs of the lands comprised, will not be obliged to accept of transumpt, tho' the legal be still current. Haddington, 7th December 1609, Master of Elphinston *contra* Irvine.

No vassal can insist against his superior for production of the titles to the superiority, in order to have them transumed for the vassal's behoof; which was found, tho' the superior here was the vassal's immediate author. Durie, 19th December 1622, Ld. Blackader *contra* Earl Murray.

WHO must be called? See Citation.

T R U S T.

When understood to be a trust?

A *GIFT* of *escheat* taken out in name of a trustee for the behoof of several persons therein named, with a general clause, "That the further benefit should be converted and applied to the remanent creditors at the sight of the Lords of treasury;" was not found to be a trust for the behoof of these remanent creditors. Home, 21st February 1724, Representatives of Lord Bowhill *contra* Creditors of Galaw.

Powers of a trustee.

A *PERSON* bound by bond to one, bearing to be for the behoof of another, cannot defend against payment upon any promise or letter of forbearance from the trustee, without warrant from the principal creditor. Durie, 8th March 1639, Stirling *contra* Cuninghame. — An apparent heir granting bond to a trustee, and insisting in an adjudication *contra hereditatem jacentem* in the trustee's name; found, That the

the trustee could not disclaim the process in respect of his trust. Stair, 19th February 1663, *Ruthven contra Hay*.

A PERSON who was a trustee in one subject, having bought in a debt of the truster's, was obliged to communicate it for the price he paid, tho' it was not alledged that he was employed or entrusted to compound debts. Stair, 15th November 1667, *Maxwell contra Maxwell*. — This will hold *a fortiori* where he buys in a right that may compete with the right wherein he is trustee. Gosford, 21st February 1673, *Rae contra Glas*. Forbes, 24th June 1712, *Wright contra Wright*. — A debt was assigned in trust in order to lead an adjudication; the adjudication was led upon the trust-debt, and several others belonging to the trustee; but there being many preferable diligences, the trustee bought in one of them, and by virtue thereof got into possession: In a process at the cedent's instance against his trustee, to accompt for his intromissions, it was found, That the apprising purchased in by the trustee could not expire in his person in prejudice of the apprising led at his instance as trustee for the pursuer, but that the same must be understood as purchased in for their common behoof, the pursuer always being liable for his proportion of the money paid for the purchase. February 1729, *Ogilvie contra Lyon*. Must communicate cases

A PARTY having filled up his friend's name in a blank assignation to a bond, without acquainting him of it, and having gone on to adjudge in his name, and then pursuing him in a declarator of trust to denude; which he declined upon this footing, That he had not agreed to be trustee, and consequently could be bound to no performance *qua* trustee: The Lords found, That he ought to denude, but so as not to be liable for any sort of warrandice. Fountainhall, 21st November 1710, *Dallas contra Leishman*. And denude when required.

ONE having acknowledged that he got a bill in trust in order to recover payment; that he transacted the same with the debtor for a lesser sum, that he had lost the bill, and did not remember the sum therein contained, but that he was willing to pay what he got from the debtor; the Lords thought the trustee's carelessness in not keeping an accompt most unjustifiable, and therefore held him as confess'd upon the whole sum libelled. Fountainhall, 28th November 1710, *Gourlie contra Dunbreck*. Bound to keep exact ac-compts.

TRUSTEES being pursued to denude themselves of lands vested in their persons by comprising, some of which held ward; and they offering a disposition, bearing provision, That the right should be burdened with the relief of wards, marriages, &c. the Lords found, That the pursuer should accept of the disposition so clogged, or in his option should secure the defenders by a bond, with a cautioner, to relieve them. Dirleton, 8th November 1666, *Carse contra Carse*. Must be kept indemnified.

PRESUMPTIONS and proof of trust. See Proof of Trust.

DILIGENCE prestable by trustees. See Diligence.

BACKBOND qualifying a trust-right. See Personal and Real.

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EXCEPTION of trust, if good against purchasers? Ibid.

TRUSTEE taking bond for his constituent's goods in his own name, or buying goods in his own name, how far the constituent is preferable? See Surrogatum.

TUTOR and PUPIL.

Father may
appoint tutors
and curators
to his chil-
dren.

EVEN a bastard may appoint tutors to his lawful children. Durie, 8th March 1628, Muir *contra* Kincaid. — Found, in terms of the act 8, parl. 1696, That a father having named curators to his son, he could not, in prejudice of the father's nomination, elect curators to himself. February 1731, Pitcairn *contra* Curators. — After the father's death his minor children are so far emancipated, that no other ascendant can name tutors to them. Balfour, (*Tutor*) 17th October 1528, the King *contra* Oliphant.

In what case
competent to
others?

A PERSON disposing his means to pupils or minors, may so qualify his gift as the means shall be administered by the persons named in his disposition, and yet the minors may chuse curators, who will have the administration of any other estate belonging to them. Dirleton, Stair, 10th December 1675, Scot *contra* Kennedy. — The like. Durie, 6th February 1633, Harpers *contra* Hamilton. — And another having heretage may name tutors to her children, tho' in prejudice of the nearest agnates. Colvil, March 1589, Dick *contra* nearest agnates. — A father found to be administrator in law, with respect to things given by him to his bastard son, tho' the grant was not clogged with that provision. Durie, 17th March 1624, Ld. Touch *contra* Tenants of Dunglass. — But tho' by the common law a father may name tutors to his children, yet before the act 8, parl. 1696, it was doubted if a father could qualify a disposition of his estate in favours of his eldest son, being a minor, with a nomination of curators, seeing the son was *alioqui successurus*. Dirleton, 21st December 1675, *contra*.

Clauses im-
plying nomi-
nation of a tu-
tor.

A MAN in his testament appointing one to be governor of his children, this was found to be a sufficient tutory testamentar. Haddington, *penult.* November 1610, Nimmo *contra* Robertson. — A father having barely ordained in his testament, that his son when seven years old should be delivered to his brother to be educated at school; this was found a valid tutory testamentar. Haddington, July 1613, Forbes *contra* Bishop of Caithness.

Who is tutor
in law?

A FATHER is by law tutor and curator to his own children, but this privilege does not devolve upon the grandfather after the father's decease. Marcus, (*Minority*) February 1685, Ld. Lamington *contra* Jolly.

A TUTOR

A TUTOR testamentar for six years after the testator's decease, not having accepted, during which time a tutor dative had administered, and also married the pupil's mother; in an action at the minor's instance, who was a female, the Lords preferred the tutor testamentar to the dative in the administration, notwithstanding the premisses; and also tho' the said tutor testamentar was curator to the heir-male, who here was conveyed for fulfilling a deed for which he was obliged to the pupil; and so was tutor to both parties; and this because during the said six years the pupil had sustained no prejudice by the cessation of the testamentar, and that the heir-male offered obedience, so that there was no litigious dispute here. Durie, 6th July 1627, Campbell *contra* Campbell. --- A tutor testamentar was preferred to a dative, not only in the administration, but also in the custody of the pupil's person, altho' he had not for six or seven years offered to manage, and the dative had been given in the mean time. The reason alledged by the tutor testamentar was, because the pupil's mother was alive all the time, during whose life the pupil had nothing, but as soon as she was dead, then he began to pursue his right. Spotiswood, Auchinleck, (*Tutor*) 17th November 1631, Auchterlony *contra* Oliphant.

If the tutor in law do not find caution within the year, his service expires, and the King may name a tutor dative; and there is no place for purging, altho' the tutor in law offered caution three days only after the year was elapsed. Colvil, 1st June 1574, Craig *contra* Johnston. --- In a like case the tutor dative was preferred, where the tutor dative, tho' he had taken out breives within a year of the decease of the pupil's father, yet had not served or found caution. Gosford, 4th December 1669, Riddel *contra* Riddel. --- And a tutor in law will be preferred to a tutor dative, if he serve and find caution within the year. Gilmour, Newbyth, 10th January 1665, Ker *contra* Logie. --- A tutor in law being fugitated for a crime, and a dative given in his place, the Lords, notwithstanding, preferred the next agnate to be tutor in law; because, tho' by the Roman law, when the tutor in law is unable to exerce, *tunc locus est dativo*, yet, in our practice, there can be no tutor dative given till year and day be expired, within which space the administration belongs to the nearest agnate. Spotiswood, (*Tutor*) Colvil, December 1590, Graham *contra* Dickson. --- A tutor in law was preferred to the dative, because, altho' he had not served within a year after the defunct's decease, yet he had served within a year after the mother's second marriage, who had been tutrix testamentar; so that this mid-impediment was found sufficient to excuse him. Durie, 15th July 1631, Grant *contra* Grant. Stair, 18th January 1678, Gray *contra* Lady Ballegerno. --- The Lords preferred a tutor in law to a tutor dative, and allowed him yet to find caution, tho' the year was expired, seeing he was served within the year, and had managed ever since, and the pupil was at no loss. Durie, Spotiswood, (*Tutor*) Auchinleck, (*Tutor*) 29th June 1632, Irvine *contra* Ld. Elfick. --- Found, That the nearest agnate ought to be preferred to a tutor dative in the tutory of an idiot, notwithstanding the agnate's cessation for five years. Durie, Auchinleck, (*Tutor*) 22d February 1628; Colquhoun *contra* Wardrop.

Tutor in
law must be
served.

A BRIEVE of tutory being directed out of the chancery to any judge in general, may be served like a general brieve of mortancestry before any judge, tho' neither tutor nor pupil are within his jurisdiction. Durie, 8th March 1636, Stewart *contra* Henderson. --- A father being administrator in law to his own children, needs not the form of a service. Balfour, (*Tutor*) 23d April 1554, *contra* Ld. Parbroth.

Tutory dative in what
circumstances
does it obtain?

A TUTOR in law being absent, and at the horn, the Lords sustained a tutory dative, without removing the other. Colvil, April 1583, Sharp supplicant. --- Process was sustained at the instance of a curator by gift of exchequer, to a furious person, he finding caution to make forthcoming; but declared it should be without prejudice to the nearest agnate of the furious person to serve by inquest; and they thought, that as the Lords might name curators *ad litem* in the *interim*, so might the King, and that the exchequer was accustomed so to do. Stair, 21st January 1663, Stewart *contra* Spreul.

Form of
appointing co-
rators.

ALTHO' the Lords can name a curator *ad litem* at the bar, yet if the subject matter require the authority of a curator *ad negotia*, they cannot give one at the bar upon a party's application, but must leave that to be done in common form, conform to the act of parliament. Colvil, 20th February 1577, *contra* . --- A female minor, past 12 years of age, being about to choose her curators, was, upon an application by her father's friends, removed from the house of her mother's sister, and sequestrated in an indifferent person's hand, and all the friends to have access to her, and they prorogated the diet for electing of curators for some months. Fountainhall, 14th July 1702, Lord Bargeny supplicant. --- In the act of curatory it is requisite, that two of the nearest of kin, both on father's side and mother's side be called. Stair, 23d July 1674, Wallace *contra* Kennedy. --- The Lords found an act of curatory null, because the nearest of kin that were cited to see the curators decerned, did not dwell within the jurisdiction of that judge. Home, January 1685, Burnet *contra* Burnet. --- The Lords refused to allow a person of quality to choose curators by a procurator, altho' the names of the curators were insert in the procuratory. Hope, (*Curator*) 13th November 1611, *contra* . --- But the contrary was found thereafter. Hope, (*Curator*) 22d July 1625, Marquis of Hamilton and his Curators. --- An act of curatory found null, being expedite some little time before the tutory expired, while the pupil was not capable in the construction of law to choose curators. Durie, 25th, Spotiswood, (*Tutor*) 26th November 1624, Ramsay *contra* Auchinlecks her curators. Spotiswood, (*Tutor*) 20th December 1634, Campbell *contra* Chalmers. --- A curator *sine quo non* being dead, it was found sufficient that the minor did appear and acknowledge the remanent curators as his curators, so that there was no necessity of a new election. Stair, 4th January 1666, Fairfouls *contra* Binning.

Minor can-
not name cura-
tors twice.

CURATORS once chosen must so remain till majority, or till they be removed by sentence of a judge, the minor can have no second choice; and therefore a tack granted by a minor with a second set of curators, was found null by reply, without necessity of reduction. Durie, 20th November 1627, Adam *contra* Fairholm.

A MINOR

A MINOR being decerned to grant a disposition in terms of his father's bond, and craving, That the Lords would authorise his writer to consent with him as his curator; the Lords refused this bill, they only granting curators *ad lites* for managing minors processes, but not to authorise them in other business; and because a minor, wanting curators, may do the same that one having curators can do, seeing in both cases he will be restored, if lesed. Fountainhall, 17th June 1696, Graham supplicant. — The Lords authorised a curator *ad litem* to give in for a minor a renunciation to be heir to his father. Forbes, 5th January 1711, Pyper supplicant. --- In a process at the instance of a pupil, with concurrence of one of three tutors against the other two, either to accept or renounce; the Lords found the pupil sufficiently authorised, and no necessity of curators *ad hanc litem*. Durie, 8th March 1628, Muir *contra* Kincaid.

Curator *ad lites*.

A PROTUTOR was not found liable for omissions, but the Lords declared, That in all time coming they would find protutors liable in all points as tutors, and ordain an act of federunt to be published thereanent. Stair, 10th June 1665, Swinton *contra* Notman. See act of federunt of that date. --- A procurator is liable as if he were curator, tho' there be other curators authorised, and that not only for his intromissions, but his omissions, from the time he begins to act as curator. Stair, 18th November 1671, Cals *contra* Eleis. --- A protutor is bound to communicate to the pupil the benefit of the compositions, when he purchases in debts affecting the pupil, in the same way that a tutor is bound. Home, January 1686, Thoires *contra* Ld. Tolquhon.

Protutor and procurator.

A MAN leaving his wife sole tutrix to his children, but withal obliging her to act with the special advice and concurrence of two others, who refused now to consent to a discharge of a debt she was offering to uplift; the Lords found, That the tutory did not fall by their refusal, and that all she was obliged to do was to require them, in which case she could validly discharge alone. Fountainhall, 17th December 1696, Clarks *contra* the Bakers of Canongate.

Tutor named with the limitation to act by the advice of certain persons.

A PARTY having nominated tutors to his child, with this quality, That they should not be liable for omissions, and they being thereafter chosen curators by the minor himself, but without any such quality, tho' they alledged, That the quality in the father's nomination should be still understood repeated; the Lords found these tutors not bound to account for omissions, but only for actual intromissions, in the terms of the father's nomination, tho' it was before the law was made, giving parents that privilege; but their Lordships found them liable for omissions as curators, for in that capacity they had no dispensation. Forbes 1st, Fountainhall, 8th February 1710, Ld. Liberton *contra* Johnston.

Tutors named with this privilege, not to be liable for omissions.

Two tutors being pursued by a third to refuse or accept, it was found, That *res* was *integra* to them to renounce, altho' several decreets had past in their names as tutors, but the inserting of their names was without their warrant. Durie, 14th, Spotiswood, (Tutor) 15th January 1630, Baird *contra* Chalmers.

Tutor or curator may renounce *rebus integris*.

But not af-
ter acceptance,
tho' the minor
consent.

A MINOR having obtained decret against his curator to renounce his office, it was found that this decret could not liberate the curator, even for his omissions thereafter, because he ought not to have yielded thereto, but proponed a defence against the same, viz. That a minor cannot pursue his curator to renounce, unless he condescend and instruct malversation. Stair, 21st July 1664, Scot *contra* Scot.

Deeds infer-
ring accep-
tance.

ROBERT LOCKHART having left a direction under his hand to his friends to fill up after his death his childrens provision in a blank sheet of paper he had signed, and to fill up the testament in another blank sheet signed, and insert therein Mr. John Eleis, my Lord Leye, and bailie Chiesly, as tutors testamentar substitute to his wife, in case of her death or marriage; and she being in a treaty of marriage after his decease, these persons subscribed in order to fill up the testament, and insert themselves tutors before the relict was actually married, and afterwards caused score the blank left to fill up the childrens provisions in; the Lords, upon a contentious debate, found these acts to be qualifications of acceptance of the tutory, and found the actors liable to accompt as tutors, altho' they had done no other deed of administration during the whole tutory. Marcus, (*Tutors and Curators*) 6th February 1682, William Lockhart, *contra* Mr. John Eleis. — *Uplifting the profits of a going coal* found a sufficient qualification of acceptance where a man is named tutor; but the same intromission, where he is not named tutor, will not subject him as protutor, but only as *negotiorum gestor*. Stair, 19th July and 6th December 1678, Beatson *contra* Beatson. — The writer of a testament was named therein tutor testamentar, having, without confirming or protesting against any acceptance of tutory, procured a gift of his pupil's ward and marriage, and having, two years after the gift, consented to a discharge with the pupil of some rents, without designing himself either tutor or donatar; and having afterwards pursued as donatar, it was alledged, That the pursuer could have no benefit by the gift, being to be looked on as tutor, and his acceptance of the office was inferred from the foresaid circumstances, especially he being the pupil's uncle. Answered, The pursuer's writing himself tutor in the testament, can import no acceptance, and his consent to the pupil's discharge being posterior to the gift, cannot be joined to make any qualification of acceptance, and the tutors are only liable from the date of the acceptance. The Lords found him liable as tutor. Marcus, (*Tutors and Curators*) 12th November 1684, *contra* Cunningham.

Tutor or
curator not
liable for what
perishes before
acceptance.

A TUTOR testamentar delaying for some time to accept, was not found liable for any thing that perished before his acceptance. Stair, 19th July 1670, Scrimzeour *contra* Wedderburn. Stair, Dirleton, Gosford, 2d February 1675, *inter eosdem*. Auchinleck, (*Tutor*) 16th, Durie, Spotiswood, (*Tutor*) 26th January 1628, Commissary of Dunkeld *contra* Abercrombie. — In a compt and reckoning betwixt a protutor and his *quondam* pupil, the protutor being charged with a sum as the price of several bestial the defunct left on the lands about a year or two before the protutor's entry to the management; and the question being, who should be burdened with the probation, whether the tutor, that, before he entred to the office, the goods were perished, or sold to persons insolvent, or the minor, that the goods were extant

tant *in specie*, or sold to responsal persons? The Lords laid the *onus probandi* on the minor, seeing, regularly, a tutor cannot be liable but from the time of his acceptance; so that if their existence at his entry were not proved, it were hard to make him accomptable for them. Fountainhall, 10th November 1697, Muir *contra* Crawford.

A TUTOR craving that the cotutors should find caution to keep him harmless for their acting, or otherwise, that they would suffer him to act alone, he finding caution to keep them harmless; this was not sustained, there being a competent remeid in law for removing the cotutors if they did transgress. Stair, Gosford, 27th June 1672, Stirling *contra* the remanent tutors of Govan.---In a diffused patrimony, there being a necessity of a factor to act under the minor's curators, and they refusing to accept of one who offered caution, but offering themselves to demit their office, the Lords found, That they could not resign the office, unless they were removed for malversing, and that they ought to give their consent to the factor's admission, unless they gave relevant objections against him or his cautioners; and recommended to the ordinary to hear them thereupon. Fountainhall, 30th November 1711, Gordon *contra* his curators. This observed also by Forbes as on 22d February 1712, where he adds, That on that day the minor having given in a nomination of a sufficient person to be his curator in the room of these recusants, the Lords did thereupon accept of their dimission.

THE Lords refused to allow consigned money to be given up to a pupil's father, as administrator in law, 'till he found caution, in respect he was a poor man. Durie, 12th February 1633, Govan *contra* Richardson.---- A tutor who is obliged to find caution, cannot pursue an action in his pupil's name, until that be done. Maitland, 18th December 1550, Tutor of Congleton *contra* the Lady.---- A nomination of tutors to an infant heir does not fall, tho' a *quorum* do not accept; but in such a case the Lords obliged the accepters to find caution, tho' regularly testamentary tutors are not put to find caution, unless there be a suspicion of their malversation, or *quod vergant ad inopiam*. Fountainhall, 22d February 1693, Countess of Callendar *contra* Earl of Linlithgow.---- But where the nomination bore, That if any of them failed, the rest should administrate, caution was not exacted, tho' but two of a great number accepted. Fountainhall, 23d November 1693, Douglas *contra* Lord Carmichael.

THO' some of the tutors were themselves the nearest of kin on the mother's side, yet it was found, That the inventory was informally given up, where there was no citation of any that was nearest of kin on the mother's side, in terms of the act 2, parl. 1672; and that in this case the next in degree after the tutors, *ex parte matris*, ought to have been cited; yet in a process against a debtor, for payment of a debt contained in an inventory thus informally given up, the Lords found, That seeing inventories were made up, and this very debt contained in them, the debtor had no interest to propone the nullity. Fountainhall, 24th June 1701, Guthrie *contra* Edgerton.

A TUTOR was removed as suspect for not making up inventories of the pupil's means and effects. Stair, 7th July 1680, Gibson *contra*

Ld. Dunkeld. — Found, That a curator not having made inventory of the pupil's estate, and left doubles conform to the act of parliament, ought to be removed as suspect; altho' it was alledged by the curator, That the pupil had but one bond of 10000 merks for his estate, which was due by his brother, and so known to his relations, that there needed no inventory. *Harcus, (Tutors and Curators)* March 1685,

Burnet *contra* Johnston. — In a process of removing a tutor testamenter as suspect, for that he had not made inventories conform to act of parliament, alledged for the defender, That the defunct gave up inventory himself of all his estate, which consisted of moveables, and the confirmation of the testament was a sufficient notification to the pupil and his friends of the estate; the Lords found, That the tutor ought to have given up inventories, &c. but in respect of the *dubietas juris* allowed him to purge the *mora*, and make inventories before extracting decret. *Harcus, (Tutors and Curators)* January 1686,

Muttray *contra* Gordon. — The Lords removed a tutor as suspect for neglecting to make up inventories, tho' he was *in cursu* to make them, having refused exhibition against the relict for that end, and tho' he had not yet intromitted; but here two years had elapsed since the office began. Fountainhall, 9th February 1698, Turnbull *contra* Bisset.

FOUND, That tho' a tutor neglects to make up inventories, is not to have the expences he is at himself for personal attendance; yet he ought to have allowance of what he expends upon process upon the pupil's aliment and education, &c. these being profitable to the pupil. *Harcus, (Tutors and Curators)* March 1685, Burnet *contra* Johnston. Fountainhall, 25th February 1686, Kennedy *contra* Cumming. Fountainhall, 16th February 1693, Cathcart of Carleton *contra* Brown of Colston. — The Lords sustained the expence of quote and confirmation of a minor's father's testament to his curator, as a ground of compensation *pro tanto* of the minor's charge against him, altho' the curator had neglected to give up judicial inventories of the minor's effects in the terms of the act of parliament 1672. Dalrymple, Forbes, 18th July 1707, Zeaman *contra* Grieves. — No allowance given to a tutor for incident personal charges in the pupil's affairs not particularly instructed, in respect inventories were not given up in terms of the act of parliament 1672; altho' the tutor had done the equivalent by signing an inventory of the pupil's whole estate, writs and evidents in presence of the nearest relatives on the father and mother's side, and giving up the said inventory to be kept by them as a charge against him. Forbes, 11th June 1709, Lady Riddoch *contra* Forsyth.

Who has the custody of the pupil?

THE mother was preferred to all others in keeping the minor's person till he should be seven years old. Balfour, (*Minor*) 22d May 1527, Foreman *contra* Oliphant. 1st March 1517, Durie *contra* Ld. Dowhill, 4th August 1516, the King *contra* Wedderburn. — But after that age the superior of old was preferred to all others, where the minor was heir of ward-lands. Balfour, (*Minor*) 4th June 1542, Ld. Lundie *contra* Lord Innermaith. 16th and *penult.* July 1532, the abbot of Aberbrothock *contra* Forbes. — The custody of the pupil's person during ward did of old belong to the superior or his donatar, and not to the tutor. Sinclair, 18th June 1542, Ld. Achans *contra*

contra Lord Livingston. — And this again thereafter was found, altho' the donatar himself was minor. Colvil, January 1584, Hamilton *contra* Lady Ernock. — The heir of an heiress being minor, the ward-superior was preferred in the custody of his person before his father and all others. Balfour, (*Minor*) 28th July 1529, Sandilands *contra* Sinclair. — The superior of ward-lands was preferred to the tutor of blench-lands, which the minor had besides those holden ward. Balfour, (*Minor*) 28th January 1547, Hepburn *contra* Ker. — But the grandfather being alive was preferred to the tutor, altho' not to the superior in ward-lands. Balfour, (*Minor*) 16th December and *penult.* February 1553, Gorthie *contra* Lord Methven. — A party being donatar to the avail of a minor's marriage, was preferred, as to the custody of his person, before the tutor, but not before the superior or his donatar of the ward. Balfour, (*Minor*) 21st October 1532, Bishop of Murray *contra* Lord Drummond. — But in other holdings the tutor was preferred to the custody of the minor's person after the age of seven years, unless the tutor was next to succeed, or had intended any action against the minor, which any way might tend to deprive him of his heretage. Balfour, (*Minor*) 18th February 1551, Clephan *contra* Lord Weemyss. 29th March 1561, and 7th June *eodem anno*, Spalding *contra* Fletcher. 16th May 1548, Crawford *contra* Hunter. 19th May 1558, Dishington *contra* Hamilton. — The Lords refused to deliver a pupil in custody to the tutor-testamentar, because he had intended process of bastardy against her, and having succumbed therein, had appealed. Maitland, 12th May 1558, Dishington *contra* Hamilton. — The tutor-testamentar will not get the minor delivered to his keeping, when he is apparent heir to the minor, albeit only in a part of the lands. Haddington, 19th January 1611, Chalmers *contra* Ld. Gadgirth. — A tutor-testamentar who bought from his pupil's heir apparent the whole apparency of his succession to the pupil, was refused the custody of his person. Haddington, January 1606, Edgar *contra* Inglis. — A grandfather having named tutors to his grandchild who was to succeed him, and the father having named other tutors in his testament, these last were preferred in the custody of the pupil's person, altho' the others had the administration of his estate. Haddington, 12th February 1611, Tutors of Gadgirth competing. — A mother was preferred before the tutor-testamentar in the custody of the pupil's person, the tutor being *alioqui successurus*, and the mother offering to aliment upon half the rent, which was very small. Nicolson, (*Pupil*) 24th January 1622, Taylor *contra* Forresters. — A tutor having obtained decret for the custody of his pupil against his mother, pursued her and her husband, who enjoyed the liferent of all the pupil's lands, for an aliment, and they having offered to entertain him *gratis*, the Lords did first prefer the mother to the custody of her child upon this offer, tho' she was married to a second husband; but thereafter this was altered, and the child ordained to remain with the tutor, and the action for aliment sustained. Durie, 14th July 1627, Noble *contra* Noble. — A tutor-testamentar was preferred to the mother in the custody even of a female pupil's person, the mother having married again, and this notwithstanding that the pupil's presumptive heir was married to the tutor's sister, and the mother offered to aliment the pupil *gratis*; which the Lords refused. Durie, 4th July 1629, Ld. Langshaw *contra*

Muir. --- A tutor-testamentar was preferred to the custody of his pupil, an heretrix, in competition with her mother being married to a second husband, tho' she offered to entertain her *gratis*. Stair, Dirleton, 5th February 1675, Fullerton *contra* Lady Boyn. --- Where there are more heirs of line than one, it was found, That the nearest agnate should get them all in keeping, *quia tunc cessat suspicio voti captandæ mortis hæredis*. Haddington, 17th January 1594, Lord Yester *contra* Lord Herreis. --- A tutor of law obtained his pupil to be removed from her mother, tho' unmarried, at the pupil's age of 11 years, tho' she was valetudinary; and because the tutor was her next heir, she was appointed to remain with one of her father's friends, to the effect she might not be influenced, as to her marriage, by her mother. Stair, 6th February 1666, Ld. of Durie *contra* the relict of Durie. --- A pupil pursuing his mother and her husband for aliment, because she liferented all his estate, the Lords, notwithstanding her offer to entertain him *gratis*, preferred the boy's tutor in the custody of his person, to whom the mother was ordained to pay a modification for the pupil's maintenance, altho' he was not a testamentar but only a dative tutor. Spotiswood, Auchinleck, (*Tutor*) 22d February 1631, Finnie *contra* Oliphant. --- A tutor-dative was preferred to the mother in the custody of the pupil's person, altho' a female and of five or six years old only, notwithstanding that the mother offered to aliment her *gratis*; but here the mother was married to a second husband, and the tutor also offered to aliment the pupil *gratis*. Auchinleck, (*Tutor*) Durie, *ult.* February 1632, Gordon *contra* Corlan. --- A curator given to an idiot was preferred in the custody of his person to all others, and even to such as had been given by his father before his decease. Balfour, (*Curator*) 15th May 1547, Winram *contra* Gibson.

FOUND, That the persons of minors are free, so that their curators cannot pretend to the keeping them, *quia curator datur bonis, non personæ*. Dirleton, 10th December 1675, Scot *contra* Kennedy.

Who has the custody of the writs?

A MINOR pursuing his curator to exhibite evidents, that so he might be entred to his lands by the superior, and also for defending him in some processs, which papers had been already exhibited by the curator in a process before the court of session; the Lords found, That they ought not to be delivered to the minor, being yet *sub curatela*, notwithstanding his need of them; but ordained that they should be kept *in retentis* by the clerk, who might lend him out such of them as he had use for, upon security to deliver them back when that use was over. Durie, Spotiswood, (*Tutor*) 18th March 1630, Ld. Haddo *contra* Ld. Ludquhairn.

Tutor acts in name of the pupil.

So long as a pupil is within seven years of age, there is no need of the subscription of a notary for him, but the tutor's subscription supplies all. Maitland, *ult.* February 1555, Prior of St. Andrews *contra* Ld. Kinnier. --- An assignation granted by a tutor of his pupil's effects, bearing to be done by the tutor as taking burden for the pupil, was found informal, because it ought to have been in name of the pupil. Stair, 17th June 1664, Justice *contra* Earl Queensberry.

Curator's part is to consent to the minor's deed.

THE father as lawful administrator to his daughter, discharging her annualrent of 30 bolls victual yearly for divers years, the same is not lawful

lawful, unless the daughter has given the discharge, she being past the age of tutory, because the father, as lawful administrator, is but in the place of a curator, who may not discharge the minor's debts, but only consent to her discharge. Haddington, 26th June 1610, Forrester *contra* Forrester. — A discharge granted by a curator is not sufficient without the minor's subscription. Stair, Dirleton, 9th January 1675, M'Intosh *contra* Fraser. — A discharge granted by a curator, without concurrence of the minor, found not to give liberation to the debtor, it being pleaded, That the deeds of a curator, without consent of his minor, are equally void as deeds of a minor without consent of his curator. December 1725, Earl of Bute and M'Kenzie *contra* Campbell.

THE authority and consent of curators to the minor's contracting may be interponed (contrary to the common law) *etiam ex intervallo*. Colvil, November 1586, Lermonth *contra* Leslie.

A TUTOR's intromission with the rents of the defunct's estate, infers not a passive title against the pupil. Stair, 30th November 1665, Boyd *contra* Lauder. — The Lords found this to be a passive title on a pupil, That his tutor had intromitted with rents of lands, and set tacks, which their Lordships found did bind him, as if they had served him heir; tho' the one gives him advertisement to seek restitution *intra annos utiles*, which the other does not: But here the party was yet within minority, and so might revoke or seek redress. Fountainhall, 15th November 1679, Fraser *contra* Lord Lovat. — A pupil whose tutor had accepted for him of a disposition from his father, was found liable personally *præceptione hæreditatis*; tho' it was pleaded, that a pupil has no will of his own, and can neither accept or repudiate; seeing the tutor acted for him, and as he had accepted, might also repudiate, and, if the minor was lesed, he might revoke. Fountainhall, 7th November 1704, Drummond *contra* Menzies.

Tutor's deed how far binding on the pupil?

ALTHO' a horning may be raised and executed against a tutor with his pupil for the pupil's debt, yet the tutor cannot be denounced thereupon. Colvil, March 1589, Kennedy *contra*. — Horning against a tutor was refused to be suspended, upon offer of compt and payment, conform to his intromissions; and it was found, that he behoved either to pay the whole contained in the decret, or renounce his office *rebus integris*. Haddington, 15th January 1595, Raa *contra* Heirs of the Lord Yester. — A pupil and his tutor being charged for payment of a sum, the Lords found the tutor liable in no more than the creditor could prove the said tutor did intromet with, or might have intromitted with. Auchinleck, (Tutor) 14th December 1632, Ld. Auchinleck *contra* Ld. and Lady Cathcart. — A tutor who had intromitted, as such, with several years rent of his pupil's lands, held taxward of the crown, was found no further liable, after his office of tutory was expired, to the donatary of the taxward duties of the said lands, than *in quantum* he had in his hands of the pupil's rents. Forbes, 18th February 1713, Countess of Cassils *contra* Earl of Rutherglen. — A curator may not be put to the horn upon charges raised upon a debt of violent profits given against his minor, upon probation of his minor's intromission, because the curator, being only charged for his interest, should not be denounced, but

Tutor and curator how far liable for the minor?

only the minor, but a tutor decerned with his minor may lawfully be denounced. Haddington, 7th March 1610, Barsheoch *contra* Gordon. --- Found, That where a renunciation to enter heir is subscribed by a minor, with consent of his curators, the curators are not understood bound as cautioners for him, nor otherwise obliged for him to warrant that deed, and that they are no further bound than to consent. Durie, 26th June 1624, Drummond *contra* Ld. Cuninghamehead.

Minor's aliment.

THE Lords declared, That, except in very singular cases, they would not suffer a minor's aliment to exceed his annualrent. Fountainhall, 26th June 1678, Pearson *contra* Belches. --- In a compt and reckoning betwixt a tutor and pupil, the tutor was not allowed to state for his pupil's aliment but what he instructed truly expended, the same not exceeding the annualrent of his free stock. Stair, 17th November 1680, Sandilands *contra* Tailfer. --- A minor's stock, tho' small, cannot be diminished for the minor's aliment by the curator. Bruce, 28th June 1715, Duncanson *contra* Duncanson.

Tutor's power of setting tacks;

A TACK set by a tutor can endure no longer than the tutory. Marcus, Appendix, (*Tutors and Curators*) Marquis of Huntly *contra* a Tenant. --- A tack set by a tutor, until a sum lent to the pupil should be paid, was sustained, even after expiring of the tutory. Gosford, 16th, Stair, 21st February 1671, Armour *contra* Lands.

If the pupil's lands be too high set, the tutor, upon an application to the Lords, will get a warrant to set them by way of publick roup. Stair, 5th February 1670, Tutor of Cubzain *contra* nearest of kin of the pupil. --- In a tutory accompt the Lords allowed an abatement of rent given to a tenant, the tutor deponing that he was not able to keep the room without abatement, and that he could not get another tenant, or set the lands at a higher rate. This the Lords had done twice before. Fountainhall, 16th July 1680, Ld. of Drummelzier *contra* Earl of Tweddale.

Of paying his pupil's debts.

A TUTOR may pay without sentence. Stair, 9th July 1667, Steven *contra* Boyd.

Tutor may uplift, but not assign his pupil's debts.

A DISCHARGE granted by a tutor of all preceeding duties, but the receipt bearing only one year's duty, was found to liberate from the pupil, conveying the party near 30 years thereafter, reserving only action against the tutor. Gosford, 24th February 1670, Applegirth *contra* Locherbee. --- A father being denounced rebel and fugitive for murder, payment made to him of a debt, as administrator to his children, was not sustained. Gosford, 9th July 1673, Forbes *contra* Forbes. --- Altho' tutors may give discharges upon receipt of sums belonging to the pupil, yet they cannot make assignations of sums resting to him. Auchinleck, (*Tutor*) 8th January 1629, Geddes *contra* Douse. --- An assigney constituted by a tutor to a bond payable to himself and successors or assignies, but mentioning the money lent upon the bond to have been his pupil's money, has right to pursue for, and discharge such a bond without concurrence of the pupil, but ought to give security to indemnify the debtor at the pupil's hands. Durie, 17th March 1636, Weir *contra* Arnot. --- A father, as lawful administrator, may uplift his son's effects; and yet he cannot assign, because that

that is no proper act of administration. Durie, 29th January 1629, Lands *contra* Douglas. Stair, 14th December 1667, Campbell *contra* Dougal. --- A father as administrator in law cannot assign a bond due to his son a pupil; and therefore in a competition anent the debt still standing out, the son was preferred, tho' the assignee offered to prove the onerous cause of the assignation was necessities advanced for the son's aliment. Fountainhall, 24th July 1694, Cramond *contra* Inglis. --- A tutor having disposed an heretable bond wherein his pupil was infest to a purchaser of the estate upon payment; in a reduction of the said disposition against the purchaser, the tutor having died insolvent, it was pretty obvious, That the disposition to the purchaser, who had an interest to disincumber the estate, was the same with a renunciation: But then it was questioned, whether a tutor can at all renounce an heretable bond, or the debtor be in safety to pay, without having the decret of a judge for his warrant, or at least seeing to the application of the money. It was pleaded for the pursuer as fixed law, That a tutor cannot assign his pupil's bonds, whether heretable or moveable, nor sell his land, unless *causa cognita* upon a decret of a judge, and such restraints would be to exceeding little purpose, if the tutor were at liberty to uplift and squander the whole debts belonging to his pupil; and to fortify this, the authority of the civil law was quoted, § 2. *Institut. quib. alien. lic. vel non*, l. 25. & 27. C. *Administ. Tut.* and Sir George M'Kenzie *Tit. (Tutors and Curators)* § 18. Answered, The intervention of a judge is only required in our law, to enquire whether the alienation be necessary, and to fix the price; neither of which can obtain in this case, where the tutor must receive payment of the pupil's debts when offered. There the judge's province is at an end, neither he nor the purchaser is bound to see to the application of the money, that part is left entirely to the tutor. In the same way a debtor may safely pay to the tutor, nor does our practice require, that he see to the application of the money; the only case where this is requisite, is, where the tutor borrows money, which being a more extraordinary step of management than even alienating the pupil's effects; and being absolutely a voluntary deed in the lender, our law imposes upon him the necessity of seeing the money applied. Possibly it would be a good regulation that this should obtain in every case, in conformity to the Roman law, but our practice has not gone so far. The Lords found, That the tutor might lawfully assign the pupil's bond in favours of the purchaser of the land affected with the heretable bond, and who had thereby right to redeem it. 31st January 1735, Graham *contra* Earl of March.

A BOND granted by a tutor is not good against the pupil, unless the creditor prove it *in rem versum*. Stair, 21st February 1671, Armour *contra* Lands. If he can borrow money?

A TUTOR may make a donatar to a reversion *sine decreto*, altho' it be *res immobilis*. Colvil, ult. February 1555, Prior of St. Andrews *contra* Ld. Kinnier. --- Found, That in case of alienation of immoveables, made by a pupil, with consent of his tutors, but *sine decreto*, absolute nullity (which took place in the common law) cannot be libelled, but only restitution upon minority and lesion. Maitland, 1st December 1565, Douglas *contra* Foreman. Cannot sell heretage *sine decreto*.

If a tutor
can alter the
nature of his
pupil's rights,
so as to affect
his succession.

THE Lords were of opinion, That a tutor could not warrantably make a sum that was heretable before his tutory moveable *ad hunc effectum*, to impower his pupil to testate thereon, in prejudice of his heir; but they did not think but a tutor might have rendred heretable a sum that was moveable before his office, tho' thereby the pupil would have been incapable to testate thereon. Marcus, Appendix (*Tutors and Curators*) 19th July 1671, Sharp *contra* Crichton. --- A tutor having uplifted his pupil's moveable sums, and, for better securing them, having taken an heretable bond, and the pupil dying, and they, by the innovation of the security, falling to the tutor, who was his heir; but the nearest of kin now quarrelling this as a deed to the tutor's own benefit, and which restricted the minor's power of disposal, because if they had remained moveable, as they were left by the father, they would have fallen under the minor's testament, and he might have disposed on them, but, being heretable, he could not during his minority; the Lords found, That the tutor could not innovate the securities, so as to prejudice the nearest of kin. Fountainhall, 12th July 1688, *contra* Marcus, (*Tutors and Curators*) observing this decision, narrates the *species facti*, as if the new bond taken by the tutor was a personal bond, with a clause secluding executors, and adds, That if the tutor had taken an heretable bond with a clause to infect, the thing had been less questionable.--- It was found justifiable in a tutor to apply the heretable bonds to the reparation of the dwelling-house, since the benefit thereof was to accrue to the heir, and not to the executor. Stair, 5th December 1665, Hill *contra* Maxwells.

Curator may
consent to the
minor's im-
ploying his
stock upon
trade.

FOUND, That a curator might employ even his female minor's stock, in joining her with another, who was a merchant holden and repute of knowledge and reputation in that trade, and also a female; and that he was not answerable for the event. Bruce, 28th June 1715, Duncanson *contra* Duncanson.

If a tutor
may transact
or submit?

A TUTOR having submitted his pupil's claim, and the pupil being charged upon the decreet-arbitral; the Lords had no occasion to determine the general point, If tutors might submit, because they found the decreet-arbitral could not afford a summar charge against his pupil, but only an ordinary action; but they declared that they would decern the pupil to implement, unless he could instruct evident lesion. Fountainhall, 18th January 1711, Aiton of Kinnaldie *contra* Scot.

THE Lords refused to find in general, That tutors might not in any case transact their pupil's affairs, because, in some dubious and intricate cases, such transactions have been allowed as warrantable. Fountainhall, 24th January 1700, Balfour *contra* Forbes. --- In the like question, the Lords, on the one hand, thought, That tutors might, in some extraordinary cases, transact; and on the other, That it might be of dangerous consequence to pupils, if all bargains their tutors made should be sustained: In the present case they fell upon this *medium*, That if it was but a *modica lesio*, they would not reverse nor rescind the transaction, but only where enorm lesion appeared. Fountainhall, 14th November 1711, Aitkenheads *contra* Aitkenheads.

Tutor may
have action a-
gainst his pu-
pil.

FOUND, That a tutor, may, lawfully comprise his pupil's estate for his own debt, the pupil having other tutors. Hope, (*Heir*) 1619, Whiteford

Whiteford *contra* Calderwood. — A tutor may lawfully pursue for a debt owing to himself, the said debt having been given up by the defunct's own mouth. Hope, (*Tutor*) 25th July 1616, Dewar *contra* Dewar. — A father may pursue his son having curators *ad lites*, altho' he be administrator in law to him. Hope, (*Minor*) 23d January 1617, Paterson *contra* Sandilands. Durie, 7th March 1623, Lord Bargeny *contra* his children. — A Lady nominate tutrix *sine qua non* to her son, pursuing him in an action of registration of her contract of marriage; the Lords sustained the pursuit, altho' she had accepted the tutory by signing divers writs as tutrix, and this because she renounced the office, and the pupil had sustained no prejudice by her signing these writs, and that the action itself was favourable: And here the Lords found it not necessary to intent action for giving curators to the minor *ad hunc litem*, seeing any person of his kin might seek such curators to him to authorise him; in which case their Lordships declared, That they would give him such curators summarily without any further process, besides, that there were other tutors nominate in the testament. Durie, *penult.* July 1625, Lady Stonyhill *contra* her Son. — Summons being raised by a tutor against his pupil, to hear and see curators *ad litem* given to him, to authorise him to defend in certain cases, not suffering delay, which the tutor was to intent against him; the Lords ordained the tutor first to condescend upon the actions, which being done, they found the libel relevant; and because the pupil had no friends in the country, ordained the tutor to give up a list of certain friends, that out of them the Lords might nominate curators. Auchinleck, (*Tutor*) 13th November 1629, Donaldson *contra* his Pupil.

THE principle of the common law, *Tutor in rem suam auctor fieri non potest*, was found to take place with us. Colvil, March 1583, Lord Sanquhair *contra* Crichton. — The like, with respect to a father as lawful administrator. Stair, Dirleton, 7th December 1666, M'Kenzie *contra* Fairholm. Stair, 25th July 1667, *inter eosdem*. — But the curator's consent is effectual where the deed is not directly in his favours, tho' he have a consequential benefit thereby. Stair, 20th February 1672, Carstairs *contra* Moncrief.

A TUTOR can take no assignation to any debt owing by the pupil's father. Hope, (*Tutor*) 25th July 1616, Dewar *contra* Dewar. — It was disputed, if a tutor could take a gift of his pupil's ward to his own use; and if the Lords should not oblige him, when pursuing thereon, to give security to apply it to the pupil's use after payment of the charges. Durie, 30th January 1629, Earl Rothes *contra* Wardlaw. — A husband being obliged by contract of marriage to provide his wife in the annualrent of some sums, and one of the bonds being granted by his brother, who was tutor also to his son and heir; the relict having, for love and favour and his pains in the pupil's affairs, discharged the annualrent of the said bond, 'twas found, That tho' this was sufficient to exclude her, yet that it could not liberate the tutor at the minor's hands, and that the benefit of the discharge, tho' in the tutor's favours, must accresce to the pupil; but our author says, That this decision was thereafter altered. Durie, 5th March 1629, White *contra* Douglas. — A tutor having acquired a tack of teinds of the pupil's lands, and taken the same in liferent to his own wife, who was

Tutor in rem suam auctor fieri nequit.

Rights respecting the pupil conveyed to the tutor or curator, do accresce to the pupil.

the pupil's mother, and after her decease to the pupil himself; the Lords found this a lawful transaction with regard to the teinds of that part of the estate which was liferented by the Lady; but as to the remainder, found, That the tack did accresce to the pupil, with the burden of a proportion of the sum laid out by the tutor in acquiring the tack. Durie, 28th March 1632, Ld. Ludquhairn *contra* Ld. Haddo. ---- The nearest agnate, after behaving as protutor, having procured a gift of the pupil's ward and marriage, and then having served himself tutor in law; yet it was found, That the gift being procured before he was tutor, and granted to himself personally, he ought to have the benefit thereof. Gosford, 27th July 1677, M'Alexander *contra* M'Alexander. ---- Found, That a right acquired to a bond before the acquirer became tutor or protutor to the debtor's son, is not presumed taken to the pupil's behoof. Marcus, (*Tutors and Curators*) 5th February 1687, Lady Ninewells *contra* Smiths. ---- In a son's contract of marriage the father disposed to him several acres of ground, after the son's decease, his children's tutor finding, that one of these acres did not belong to the disposer himself, but to the disposer's wife, grandmother to the pupils, solicited a gratuitous disposition of the same from her; it was found, That the right acquired by the tutor to the acre of land in question accresced to the pupil, it being pleaded, That there ought no difference to be made in this case betwixt onerous and gratuitous acquisitions; *imo*, Because every step taken by a tutor touching his pupil's estate, must be presumed done with a view to the interest of his pupil. *2do*, Because, were this distinction admitted, the pupil would have no security, the tutor having it generally in his power to frame the narrative of a deed conceived in his own favours. 17th February 1732, Cochran *contra* Cochran.

Removing
of suspect tu-
tors.

IN a reduction of a tutory, it being alledged, among other things, That the tutor nominated had cheated the defunct, and had obtained a writ from him by circumvention in place of another; the Lords removed him as suspect on this head, tho' the circumvention was committed before the nomination. Fountainhall, 29th July 1680, *contra* . ---- Tutors testamentar being nominated, with all the privileges of the act 8, parl. 1696, and having, in the space of two years and an half, uplifted vast sums belonging to the pupil, without either reemploying the same, or being able to give any rational account how they had disposed on the money; the Lords, in a process at the instance of friends for removing these tutors as suspect, tho' they found that they had not answered the trust reposed in them, yet declared, That if they would find sufficient caution for bygones and in time coming, they would not remove them, being tutors testamentar in whom the defunct reposed trust; and therefore the Lords allowed them a day betwixt and which they might offer sufficient caution; and if not, then their Lordships removed them from their office as suspect. Fountainhall, 16th February 1705, Balfours *contra* Forresters.

Mother tu-
trix forfeits by
marrying a
second hus-
band.

A MOTHER being tutrix, not only forfeits the office by superinducing a stepfather, (conform to the common law) but also by falling into fornication. Balfour, (*Tutor*) 14th July 1557, Ld. Largo *contra* Monipenny.

IN

IN a cômpt and reckoning betwixt a pupil and his tutor, the tutor craved a sum contained in the confirmed testament might be struck out of the charge, because there was nothing to instruct it but the defunct's assertion in his testament giving up his debts; the pupil answered, That the confirmed testament was an inventory for which the tutor was bound to do diligence, and therefore his never having protested against this debt was a plain evidence of his acquiescence therein, which was found relevant. Stair, 12th February 1662, Kirktons *contra* Ld. Hunthill. ---- A confirmed testament is a sufficient charge against a tutor nominate to make him accompt for the whole bonds, altho' the inventory be given up by another. Gosford, 22d July 1669, Napier *contra* Wood. ---- In a compt and reckoning with a tutor, who had by warrant roused his pupil's plenishing, the Lords found, That the prices gotten at the roup of the minor's free plenishing (deducting the expences of the roup) is the rule by which the tutor must be made to accompt, and not the prices given up at random in the confirmed testament. Fountainhall, 29th November 1683, Wilfon *contra* Foulis.

A TUTOR is not liable for the value of services of the pupil's tenants, by harrowing, plowing, shearing, &c. tho' he received these services in kind, because he could not force the tenants to pay the price for the same. Stair, 11th January 1668, Grant *contra* Grant. ---- In a tutory accompt the Lords found, That the kain-fowls of the pupil's lands might be used by the tutor as a casualty for his pains, even where they are numerous, since the burden of the administration will be proportionally great, and in buying lands the kains are not estimated: Farther it is to be presumed, that the tutor uses them when he is employed in his pupil's affairs; and tho' it be *officium gratuitum*, yet law deals strictly with them in the matter of diligence, & *gravatus in uno levandus est in alio*. Fountainhall, 24th June 1680, Wright *contra* Veitch. — In a tutory accompt the Lords found, That the tutor might consume the flying customs, *viz.* hens, capons and chickens, (not geese) without being liable to his pupil for the value, and likewise they allowed him some stones of butter yearly, in respect he being tutor in law, and living in a different shire from that where the pupil's estate lay, had frequent occasion to come there to manage the pupil's affairs. Marcus, (*Tutors and Curators*) January 1684, Tutor of Lude *contra* Lude and his curators.

IN an exhibition of the defunct's writs at the minor's instance against his *quondam* tutor, the tutor offering to deliver up those that belonged properly to the defunct; the Lords found the pursuer had interest to call for exhibition and delivery of all writs that were in his father's possession *quovis modo*, reserving every party's claim as accords. Stair, 10th January 1665, Reid *contra* Reid. ---- In a process of removing at a man's instance against his *quondam* tutor, the pursuer was not put to show the right of his defunct predecessor; but it was found, That he ought to be restored to his predecessor's possession, which after his decease was continued by the tutor in his pupil the pursuer's name, reserving to the tutor his claim to the property as accords. Falconer, 8th December 1685, Durham *contra* Lady Ethiebetton.

FOUND, That the pupil must give the tutor allowance for cess, teinds, and feu-duty, upon procuring declarations from the collectors of the cess, and the chamberlains of the titulars and superior, that

such cesses, teind and feu-duties were paid, and finding caution to relieve the minor thereof, altho' the particular receipts were not produced. Forbes, 11th June 1709, Bruce *contra* Forsyth.

FOUND, That the minor's uplifting a part of his rents, did only make him liable for his actual intromission, and did not exoner the curators from compting for the whole rents, deducing what the minor uplifted. In this case the pursuer, after his majority, had compted with some of the tenants and given them general discharges; but this could not relieve the curators with regard to the other tenants. Forbes, 5th December 1707, Cuningham of Enterkin *contra* his curators.

ONE cannot quarrel his curators for concurring with him in a detrimental deed, if he neglected to revoke and reduce the deed *intra annos utiles*. Home, 25th July 1727, Cuningham of Enterkin *contra* his curators.

*Actio contra-
via tutela &
curatela.*

A CURATOR in his accompts having given in a general article of incident charges, such as, drinking with agents in taverns, &c. amounting to a considerable sum; the Lords refused to allow the same in these terms, but ordained him to condescend upon particulars, with a view to modify the same. Dirleton, 23d January 1677, Tailfer *contra* Sandilands. — The Lords found, That there was no ground to crave a yearly sum for the tutor's incident charges where they were not condescended on. Fountainhall, 10th July 1688, Wilson *contra* Foulis. — The Lords refused to grant to a tutor a modification for his pains, by and attour his expences. Nicolson, (*Curators*) February 1642, Ld. Scotstarbat *contra* Earl Buccleugh.

HUSBAND curator to his wife, being minor. See Husband and Wife.

DILIGENCE prestable by tutor and curator. See Diligence.

LIABLE for annualrent. See Annualrent.

QUORUM. See Solidum & pro rata.

MINOR may not be a tutor. See Minor.

MINOR acting without consent of curators. See Minor.

TUTORS and curators must accompt by the fiars. See Fiars.

TUTORS or curators, or their assignies, cannot pursue ante red-ditas rationes. See Payment.

UDAL RIGHTS.

THE Lords found, That udal lands must be bruiked by some lawful title, and that naked kindness and possession natural is not sufficient to give right thereto. Haddington, *penult.* March 1624, Sinclair *contra* Hawick.

ULTIMUS

ULTIMUS HÆRES.

WHEN the issue of a bastard all fail, the King is *ultimus hæres* When it takes place? to the last of them, for there is no collateral or ascendant succession of the bastard. Durie, 13th July 1626, Ld. of Halcro *contra* Somervell.

A DONATAR of *ultimus hæres*, tho' liable to the defunct's debts Can the donatar defend himself upon a separate right? *in valorem* of the subject, is not in the case of an executor, who must fairly accompt for the subjects confirmed, and cannot defend himself upon singular titles; therefore a donatar of *ultimus hæres*, was allowed to compete with the creditors upon a gift of recognition acquired by him. Fountainhall, 3d and 4th February 1686, Creditors of Dundee *contra* Earl Lauderdale. ----- But the donatar was found liable to accompt for the rents intromitted with by him upon that title, before he acquired the gift of recognition; tho' he objected, that the defunct had made a disposition of his estate, which rendered the gift of *ultimus hæres* of no effect, in respect it was answered, he could not object the defect of his own title. Marcus, (*Airs*) March 1686, *inter eosdem*.

U N I O N.

SASINE taken upon a charter granted by a subject, uniting The King only can make an union. the lands in one tenement, was found ineffectual as to the discontiguous lands, because no man can create an union save the King only. Durie, Haddington, 16th January 1623, Aitkin *contra* Grinnislaw. Durie, 16th December 1628, Lady Borthwick *contra* Goldlands. Durie, 10th February 1631, Earl Galloway *contra* Burgeses of Wigton. ----- But an union was found sufficiently established by the King's confirmation of a charter, bearing a clause of union. Durie, 26th January 1636, Lady Borthwick *contra* Ker.

THE Lords sustained the sasine of a mill as a sufficient active title, Where sasine must be taken, and, imo, Where there is an union. tho' it bore only the symbols of earth and stone, whereas a mill is *distinctum tenementum*, and requires delivery of the clap and happer, and this because the charter bore a dispensation to take infeftment at the manor place for the whole, and yet the lands were not erected into a barony. Fountainhall, 1st December 1686, Hamilton *contra* Ramsay. ----- Lands lying discontigue, and in different shires, being erected into one barony by the crown, and one particular place appointed for taking infeftment to affect the whole barony; a base infeftment taken by precept from the King's vassal at the place appointed by the charter from the crown, is good for the whole lands. Durie, 22d June and 11th July 1637, Lady Blairquhon *contra* Tenants. ----- But sasine taken at a different place than that appointed by the charter, will only be effectual for the lands contiguous to the place where taken.

Durie, 23d July 1628, Lady Ednem *contra* Ld. Ednem. 19th March 1636, Ld. Lauristoun *contra* Ld. Dunnipace.

2do, Where the lands are in one charter, but no union.

LANDS being erected in a barony, without mention of union, or that *safine* taken at one particular place should be sufficient for the whole; one *safine* taken will be sufficient to establish a real right upon all the contiguous lands, but not upon those which are discontinuous. Hope, (*Safine*) 8th March 1620, *contra* Durie, 16th November 1630, Ld. Clackmannan *contra* Allardice. Durie, 10th February 1631, Earl Galloway *contra* Burgeses of Wigton. — Lands lying runridge within burgh, if a party take *safine* upon one part thereof, it was found sufficient, and that he could not be compelled to take it at the particular ridges, acres or sheds thereof. Haddington, Home *contra* Tenants of Ayton. — A few acres being bought by my Lord Kincardin from several heretors, being inclosed in one park with some of his own land, and so naturally united; a dispensation by a subject for taking *safine* at one place for the whole, was found sufficient, without a formal erection and union from the King. Marcus, (*Infeftment*) February 1686, Countess of Kincardin *contra* Earl Mar.

3tio, Where the lands are contiguous, but not in one charter.

Two feus belonging to different vassals, but lying contigue, and contained both in one superior's charter, having been purchased in by one person, it was argued, That this naturally made an union, so as to be in the power of the purchaser, by giving *infeftment* in any one spot, to make it extend over both tenements; which was repelled, in respect, that tho' the tenements lying contigue were naturally united in the superior's person, who possessed them both by one title, it was not so with the vassal, who possessing them by distinct titles, derived from different authors, as to him they were no more united, than if lying from one another at the greatest distance. July 1729, Bank of Scotland *contra* Ramsay.

4to, *Safine* of a jurisdiction.

SASINE of the office of a bailie of regality was sustained, tho' appointed by the Lord of the regality's precept insert therein, to be taken at his castle for all the lands within the bailiary, altho' the lands lay far discontinuous, and a subject cannot make an union; and that because this was no union of lands, but only a place designed for taking *safine* of a jurisdiction granted by the Lord, which he might freely appoint; and many thought that no *safine* in such cases is requisite. Durie, Spotiswood, (*Bailiary*) Auchinleck, (*Safine*) 19th January 1630, Bruce *contra* Wardlaw.

Union how dissolved?

A SASINE of lands given to the liferenter, dissolves not the union of these lands with other lands. Balfour, (*Safine*) 1st February 1564, Lady Symington *contra* Ld. Symington. — By a charter from the crown, the several baronies, lands, &c. belonging to the Lord Auchterhouse, were united into the Earldom of Buchan, with a dispensation for taking *infeftment* of the whole at the castle of Bamff; this castle being afterwards dissolved from the Earldom by alienation, a *safine* of the Earldom taken thereat as formerly was found null. January 1725, Earl of Buchan *contra* Duff.

IF lands remain united in the person of a singular successor? See Personal and Transmissible.

USURY.

U S U R Y.

A CONTRACT for usury annualrent, is not punishable where the lawful annualrent is only taken. *Erskine*, 8th March 1623, King's Advocate *contra* Morison. — A contract containing annualrent far above what was allowed by law, was sustained, because the party had got no payment of that extraordinary profit, and was content, when pursued for usury, to restrict to the ordinary annualrent. *Haddington*, 23d February 1610, *Wauchop contra* Lady Blackburn.

By the old law, taking, not barely contracting, inferred usury.

A PARTY for love and favour, having disposed his lands, redeemable for 12000 merks, and having taken a backtack of the same, bearing a duty more than the legal interest; this was found to be lawful, seeing usury relates to borrowed money only. *Durie*, 6th March 1632, *Ld. Gathland contra* Ker. — Carmichael and Stalker joined in a copartnery of bookfelling at Glasgow; Carmichael stocked in two thirds, amounting to L. 212, and the profits were to be divided equally betwixt them, because Stalker was to undertake the whole management; they afterwards entered into a new contract for three years, wherein they declared the former copartnery dissolved, "Carmichael conveys to Stalker his stock and profits, to be restored to him in money or books at the end of the three years; and Stalker on the other part became bound to pay him L. 46 yearly, at four terms in the year." This was not found a covered loan. It was pleaded to be a bargain of hazard, Stalker giving his partner a certain sum in lieu of profits, taking his chance whether they should be more or less; and therefore the Lords repelled the objection of usury. 15th January 1735, *Stalker contra* Carmichael.

Usury relates to borrowed money only.

A BOND for a perpetual annuity above the legal annualrent, redeemable by the debtor on payment of the principal sum and bygone annuities resting at the time, was found to be usurious, altho' the principal sum was sunk *quoad* the creditor, who could not charge for payment thereof upon the bond. *Forbes*, 26th January 1709, *Colvil contra* Irvine.

Perpetual annuity above the legal interest.

It is an usurious paction to stipulate, That each term's annualrent should bear annualrent after falling due. *Stair*, Gosford, 26th January 1669, *Lady Braid contra* Earl of Kinghorn. — It is lawful at the time of lending the money, and making the bond, to add to the principal whatever annualrents shall fall due betwixt the date of the bond and the term of payment, making one accumulate sum, bearing interest from the term of payment. *Home*, February 1718, *Sinclair contra* Sutherland.

Stipulation for annualrent of annualrent.

TAKING annualrent before the term of its payment, infers usury. *Stair*, 1st December 1680, *Johnston contra* Ld. of Haining. — But a backtack of wadset-lands having been taken by the granter of the wadset for a yearly rent, corresponding to the annualrent of the wadset-sum, but payable before annualrent could fall due upon the wadset-sum; the same was not found usurious, being the rent of the land, which

Taking annualrent before the term.

might be made payable as the parties could agree. Durie, 6th February 1622, Lord Pitligo *contra* Ld. Muckall.

Bond bearing annualrent before its date.

A BOND being granted, bearing annualrent a quarter before its date, but not bearing to be for borrowed money, but "That the party is justly adebted, resting and owing;" the Lords sustained this to take off the presumption of usury, unless it were proved by the creditor's oath, that it was not resting at the preceeding term. Fountainhall, 9th February 1697, M'Culloch *contra* Rofs. — A bond dated 23d April, bearing annualrent from the Martinmas preceeding, was not found usurious, containing in the narrative "justly adebted and resting," tho' it did not bear a declaration that the money was lent at Martinmas. Forbes, 7th November 1711, Scot *contra* Baillie.

Retention not allowed.

A CREDITOR being challenged for usury, who had taken the full year's annualrent, without allowing retention to the debtor, conform to the act of parliament, gave in this defence, That he had taken no more than the legal interest, which was 6 *per cent.* and as for not allowing the retention of one *per cent.* it may infer repetition, but not a forfeiture, seeing there is no such certification in the act; the Lords found, That seeing creditors might doubt, whether the not allowing of retention inferred usury, whosoever had taken the full annual, if they allowed or repaid the same within the year of retention, it should not infer usury, otherwise that it should: For they found, That if the certification were only repetition, it would not be effectual, seeing the debtor might certainly renounce that benefit. Stair, 30th July 1673, Stevenson *contra* Wilkieson. — When retention of one *per cent.* of annualrent was allowed by the act of parl. 1672, a countryman having received his annualrent, without making that allowance: In a suspension of double poinding, where a party, who had a general gift of usury from the King, compeared and craved the principal sum, as due to him by law; the Lords found, That usury was not thereby inferred, in respect that the act of parliament does not express the penalty of not allowing retention to be usury, and also because of the rusticity of the party, and smallness of the sum not retained, and ambiguity of the practice as to this point; and therefore found the letters orderly proceeded, except as to the sum whereof the debtor should have had retention. Home, March 1682, Dickson *contra* Brown.

Usury upon the Usurper's acts.

It was found to be usury that a creditor took more than six *per cent.* after the act parl. 1649, reducing annualrent to 6 *per cent.* tho' that act was thereafter rescinded. Stair, 22d July 1675, Geddes *contra* Budge.

Stipulating more than the legal annualrent as a failzie.

A PARTY having borrowed money from the bank of Scotland at four *per cent.* while the legal interest was at five, with a provision to pay six *per cent.* if he failed in payment a month after the term; the Lords found the whole six due, not as annualrent, but as damage liquidated betwixt the parties. Fountainhall, 23d July 1697, Bank of Scotland *contra* Murray.

Stipulating a greater principal sum as a failzie.

A SUM being contained in an obligation, with a backbond written on the back thereof, declaring that the creditor, in case of payment of the half of the sum at a day certain, should discharge the whole; the debtor

debitor having failed, the Lords found, That he might be charged for the whole, and that it was not ufury. Haddington, July 1595, Craven *contra* Wilsons. — Philorth having obliged himself to pay at Whitsunday 1604, the number of 4000 Bolls victual; and failing thereof, L. 4 for the boll, providing if he paid 6000 merks before the term, he should be free; the bond being suspended as against the act 1597, the Lords sustained the bond for the principal sum of 6000 merks, and annualrent at ten *per cent*. Haddington, *penult*. February 1622, Philorth *contra* Irvine.

A WADSET is not reckoned usurious where the wadsetter bears the hazard of the rents, tho' they far exceed the annualrent of the wadset sum. Durie, 11th December 1623, Lady Colington *contra* Ker. Usurious clauses in wadsets.

ONE having wadset his land for L. 1000, when the legal interest was at ten *per cent*. and warranted the same to be worth 22 bolls yearly, which, according to the conversion established by the act 52. parl. 1587, was two bolls above the common interest; and the wadsetter, who had recovered but 20 bolls yearly out of the lands, insisting against the reverser, upon his warrandice, for payment of the other two bolls, due many years *retro*: The Lords found, That this being a proper wadset, and no backtack for payment of a greater duty than the legal interest, did not fall under the act 251, parl. 1597; and therefore the wadsetter might uplift the whole rents, however great, out of the land; but then they found, That the clause of warrandice could not be effectual, seeing it landed in a personal action for payment of annualrent greater than what is allowed by law. Durie, 6th July 1630, Nisbet *contra* Earl Cassils. — By act 62. parl. 1661, it is declared, "That proper wadsets, granted since the year 1649, exceeding the legal interest, and yet burdening the reverser with the hazard of the fruits, tenants, war, or troubles, shall be restricted to the neat annualrent, and the wadsetter be accomptable for the superplus;" upon this footing a proper wadset being conceived, with a clause warranting the wadsetter "against all maintenance, taxations, and other impositions," the wadsetter was found obliged to accompt in terms of the act. Stair, 17th February 1672, Douglas *contra* Vernor. — But the contrary was found. January 1728, Creditors of Elliot *contra* Maxwell. — And tho' the wadsetter was warranted against levies of horse, feu-duties, and ministers stipends, he was not found obliged to accompt, seeing he run the risque of the fruits, tenants, war, and vastation. Dirleton, 24th January 1677, Home *contra* Stewart. — Found, That a wadset, tho' very lucrative, and bearing relief of all publick burdens, and of some of the hazards mentioned in the act, was not to be restricted to the annualrent, in respect it did not secure against all the hazards mentioned in the act, *viz.* fruits, tenants, or war. Harcus, (*Wadset*) Falconer, 9th December 1685, Cuninghame *contra* Dowie. — A wadset being granted in the year 1653, for 24500 merks, the reverser warranting the rents to be yearly twelve chalders bear; the wadsetter, here, was found accomptable, tho' he run the hazard of the price of the victual, which might possibly have fallen below the annualrent of the money; which minute hazard was not respected, seeing where a creditor does even stipulate directly more than the legal interest, he runs the chance of his debitor's solvency. Home, 18th July 1718, Doull *contra* Creditors of Winterfield.

IN a proper wadset, which at the same time was abundantly lucrative, besides repayment of the wadset sum of *L.* 12000 Scots, it was stipulated that the reverser should not redeem till he also paid the annualrent of *L.* 1000 Scots from the date of the contract; and the wadsetter was impowered to use requisition for these annualrents, as well as for the wadset sum itself: In a declarator of redemption this clause was quarrelled as both usurious and penal; usurious, as tending to secure the creditor in more than the legal interest; penal, being contrived to bar redemption. The wadsetter answered, That this clause did indeed make the wadset more lucrative, but it could not be usurious, as not falling under any of the acts anent usury, nor penal, being a part of the original transaction, and not stipulated as a failzie. The Lords repelled the objection. 3d December 1734, Ramsay *contra* Clapperton.

Tack ad-
jected to a
wadset, with-
in the real
rent of the
lands.

A WADSET being granted to a brother for his portion, containing a 19 years tack, to commence after redemption of the wadset; the tack was sustained, tho' far within the rent of the lands, notwithstanding the act 1449, *C.* 19. Stair, 21st January 1662, Lord Polwarth *contra* Home. — In a declarator of redemption, a three years tack being craved by the defender after redemption, conform to a clause in the wadset, tho' the tack-duty was but worth the third part of the true rent; the Lords repelled this demand, and found all such tacks null by way of exception, and so revived the aforesaid act, which was gone in desuetude. Newbyth, 8th February 1666, Lord Ley *contra* Porteous. — A backtack, to take place after redemption of the wadset, was found valid, unless the duty was far under what the lands paid the time of the wadset, and that regard was not to be had to the worth of the land at the time of redemption; for if the wadsetter, upon consideration of the tack, had improved the land before redemption, he ought to have the benefit. Stair, 17th February 1672, Douglas *contra* Vernor.

Usurious
clauses in
tacks.

IN security of a debt of 4000 merks, the debtor set to his creditor a tack of lands, giving the creditor his choice to pay 53 Bolls victual yearly, or twenty shillings Scots less than the Candlemas fiars; this tack was sustained, tho' plainly lucrative, it being to be reached by no standing law, and lucrative tacks are no more usurious than lucrative wadsets. Stair, 23d November 1664, Scot *contra* Ld. Bearford. — In the year 1704, while annualrent was at six *per cent.* M'Lellan, for the sum of 4500 merks, sold some lands to Barclay, and of the same date takes from him a tack of the same for 10 years, for *L.* 120 of money rent, and 18 bolls victual, or ten merks *per boll*, in the option of the tackfman, out of which tack-duty he was to advance the whole teind, being *L.* 40 yearly, and half of the cefs; there was a clause adjected of a reversion competent to the seller, during the years of the tack, upon repayment of the foresaid sum of 4500 merks. It was objected against the contract, That it appeared to be but a covered loan, and that a tack-duty being made certain to the creditor exceeding the ordinary annualrent, the bargain was usurious, and the disposition and tack null. The Lords repelled the objection. February 1727, M'Lellan *contra* Barclay.

A PARTY

A PARTY having exacted 20 sh. Scots more than his neat annual rent, the Lords judging that it had happened thro' pure mistake, they repelled this reason of suspension, and found no usury in this case, but ordained the charger to restore the excesse, or allow it in the next year's annualrent. Fountainhall, Forbes, 24th July 1706, Donaldson *contra* Town of Brechin.-----The Lords refused to infer usury from a taking thro' mistake twice payment of ordinary annualrent for one term. Forbes's MS. 29th January 1714, Town of Aberdeen *contra* Martin.

Where the
exaction hap-
pens by mi-
stake.

USURIOUS stipulation pleaded upon, to cut down adjudication. See Adjudication.

V A S S A L.

IN an action of removing, found, That the ward of the lands could not fall into the King's hands by decease of Patrick Lord Sinclair, because not only was comprising led against him before his decease, but also his majesty, upon the comprising, had given a charter; and altho' the Lord Sinclair died before sasine, yet that could not prejudice the comprising and infeftment. Hope, (*Ward*) 29th November 1615, Hamilton *contra* Tenants of Newburgh. — A creditor having comprised lands from his debtor, and being infeft thereupon, and, after the debtor's decease, obtaining a gift of nonentry of the lands; the Lords sustained process of nonentry at his instance, altho' the lands seemed full by his own infeftment; because, that if the comprising proved not good, he might clothe himself with the other right. Spotswood, (*Nonentry*) 2d December 1630, Lord Yester *contra* Tweedie. — An apprising with a charge denudes not the vassal, nor hinders his liferent-escheat to fall. Stair, 28th June 1667, Douglas *contra* Lisk. — Apprising with a charge against the superior, does not state the appriser as vassal; and the apprising being of ward-lands, the ward was found to fall by the death of the debtor, who still continued in the property, and not by the death of the appriser. Stair, Gosford, 9th February 1669, Black *contra* French. — A gratuitous bond granted by a ward-vassal to his apparent heir, in order to lead an adjudication, upon which the heir was infeft during his predecessor's life, was found to exclude the casualty of ward; for simulation or fraud could not be relevant in this case, seeing the vassal might have directly resigned the lands in favours of his heir, and the King refuses no man; but it was found, That so soon as the apprising is extinct, whether before or after the defunct's death, the ward takes effect. Stair, 20th July 1671, Lindsay *contra* Maxwell. ---- A compriser of ward-lands being satisfied before his death, tho' he never renounced, the Lords found, That his son's ward or marriage does not fall to the superior by his death, but by the death of the debtor against whom the comprising was led. Gosford, 19th December 1672, King's Advocate *contra* Lowes. ----- The Lords found, That the avail of tocher or marriage falls due by the death of the appriser of ward-lands, he being infeft on his apprising, tho' the legal be yet current; and accordingly

Casualties
of superiority,
whether they
fall by the de-
bitor or adjud-
ger?

modified two years rent, not only of the apprised lands, but of the apprifer's whole other estate, and decerned personally for it; as also the ground of the apprised lands to be poinded, but only in so far as the sums in the apprising would extend to, and no further, because it was not expired. Fountainhall, 13th, Stair, 28th July 1680, King's Advocate and Sollicitor *contra* Yeoman. ---- In an action of recognition, the Lords found, That a confirmation granted by the superior after he was denuded by expired comprisings, could not defend against the recognition. Home, January 1684, Shearer *contra* Lord Salton. ---- The Lords found recognition incurred by the reverser's deeds within the legal, and that it could not fall by any deed of the apprifer, who had only a real pledge for security of his money in the apprised or adjudged lands during the currency of the legal, but did not fully denude the debtor till after the legal was outrun. Fountainhall, Dalrymple, Forbes, 15th July 1707, Creditors of Edinglassie *contra* Gordon. ---- No casualty of superiority doth fall thro' the death of an apprifer infest, who, during the legal has conveyed his right by disposition in favours of the reverser, recorded in the register of reversions. Forbes, 12th February 1713, Erskine *contra* Hamilton. ---- A ward vassal, against whom many adjudications had been led, dying, leaving his eldest son an infant; in a competition betwixt the donatar of ward and the adjudgers, the Lords were of opinion, That ward does not fall by the death of the apprifer within the legal, tho' infest and in possession; for during the legal he is considered in no other shape than as a creditor, and even after the legal it is in his option either to keep up his debt, or to lay hold of the lands in lieu thereof, and if he does not choose to possess, he is understood to adhere to his claim as a creditor; and it would create great confusion were it otherwise; adjudgers come in *pâri passu*, and as every one of them may be infest during the legal, by the death of which of them shall the ward fall? Upon these considerations they found, That the ward had fallen by the death of the debtor. 24th July 1739, Donatar of ward *contra* Creditors of Bonhard.

Whether by
the debtor or
improper wad-
setter?

THE ward was found to fall by the death of an improper wadsetter infest. Marcus, (*Ward*) 15th February 1688, Lord Chancellor *contra* Brown.

VENTRE INSPICIENDO.

SEE this done. Fountainhall, 30th June 1699, Ross *contra* Gray.

VIOLENT PROFITS.

In a removing.

WHERE a lady liferentrix made an assigney to an action of removing, and deceased after litiscontestation, the Lords found, That the defenders had thereby an emergent exception to elide the summons

summons touching the removing itself, but their Lordships decerned them in violent profits at the assigney's instance, from the time of the warning to the liferentrix's death. Haddington, 2d June 1595, Rofs *contra* Lady Foulis.

ACTION for double mail as violent profits, was sustained in Leith, tho' only a burgh of barony, in respect of the number and worth of the houses, which otherwise is only allowable within royal burghs. Haddington, 16th November 1611, Waddel *contra* Buchan.

ACTION for violent profits was found only competent to him who really occupied and was in possession. Colvil, July 1582, Darnetston *contra* Magistrates of Linlithgow. — In case of violent possession, the libelling of all profits that might have arisen from goods pastured on the ground, such as lambs, wooll, butter, cheese, &c. was sustained, tho' no such goods were spuilzied from the pursuer, nor had he any on the ground. Maitland, 13th December 1552, Ld. Rankeilor *contra* Lord Lindsay. In an ejection

IN a process of spuilzie, the Lords found, That the profits are to be restored which the pursuer might have had from the day of spoliation to the raising of the summons, and not to the day of pronouncing the decret. Balfour, (*Spuilzie*) 23d March 1530, Lord Yester *contra* Hay. — Found, That the highest profits may be libelled as in a spuilzie, altho' there was no violence done, but only cattle put in to graze without liberty. Maitland, 23d July 1551, Ld. of Coldingknows *contra* Tenants of Dudistoun. — In an action of spuilzie of labouring goods, the Lords found, That if the pursuer have laboured his lands as formerly he was in use to do, after committing the spuilzie, he can have no action for the profits. Balfour, (*Spuilzie*) 17th January 1563, Elisabeth H. *contra* Steel. — A party having stopped panwood from coming to another man's salt pan, and the pursuer having libelled extravagantly, viz. the loss of so much salt daily, beside the coals; the Lords found the libel indeed relevant, but reserved the modification of the profits to themselves. Colvil, 22d July 1580, a clerk in Dyfart *contra* Lord Sinclair. — In a spuilzie of a caldron and stell pot, the Lords allowed the browst and expence of the pursuit in name of damage, but not the rent of the brewery as laid waste, and the loss of the pursuer's trade by the spuilzie, nor yet the price of brew looms that fell down for want of use, or of malt spoiled for want of the caldron to brew in. Forbes, 5th February 1706, Ker *contra* Dunbar. In a spuilzie.

V I R T U A L.

Virtual Assignment.

A PARTY in his son's contract of marriage having warranted the lands to be free of teind, except a certain number of bolls; this was found to be a virtual assignation to a tack of teinds in the disposer's

ner's person, so as to prefer the son in competition with a posterior assignee, who acquired the said tack from the father for onerous causes; tho' it was alledged, That the warrandice in the contract of marriage was but of the nature of a personal obligation, binding indeed upon the granter, but not equivalent to an absolute right formally constitute. Durie, 20th March 1629, Ld. of Finmouth *contra* Weemyss. — But in a case where the teind-sheaves, payable by the respective heretors, were assigned by the tacksmen in security and payment of a debt, this was only found a personal right, tho' clad with possession, and a posterior assignee to the tack itself was found preferable, as being the only real right. Durie, 25th March 1628, Lord Blantyre *contra* Parishioners of Bothwell.

A MAN having in his person a disposition to a tenement, with procuratory and precept without infeftment, provided his wife to the mails and duties of the tenement during her life; this assignation to the mails and duties was found to imply a conveyance of the husband's right by disposition; upon which footing the relict was preferred to a creditor who adjudged the tenement after the husband's decease, and charged the superior. Fountainhall, Dalrymple, 3d January 1699, Muir *contra* Fullerton. — Assignation to mails and duties, "for the present term and in time coming," imports an absolute right to the lands, and therefore the cedent was found liable to dispoise in a legal form with procuratory and precept, *quia concessio jure conceduntur omnia sine quibus explicari non potest*. Stair, Dirleton, 2d July 1667, Sinclair *contra* Coupar.

A CREDITOR having, upon the back of his bond, addressed the debtor in the following terms, "I desire you may transact the inclosed bond with the bearer James Hunter in his own name;" and having delivered the bond, but dying before a new bond was taken in James Hunter's name; this was found to be no habile transmission of the bond, and so the relict was found entitled to her half thereof, in virtue of her contract of marriage, by which she was provided to the half of all debts and sums of money that should belong to the husband the time of his decease. Bruce, 11th June 1715, Farquhar *contra* Hunters.

LANDS being sold with the consent of a creditor, whose right was preferable upon that subject, as well as upon the other lands that remained with the seller; and the purchaser insisting against this creditor to communicate his debt and diligence to him the purchaser, in order to protect him against the diligence of other creditors, the defence was, That consent in this case imports only a *non repugnantia*, and not a conveyance. It was admitted, that the consent of a proprietor or creditor to a disposition of the whole subject affected by his right, is a virtual conveyance, for he can have no interest to withhold his right after he passes from all claim to the subject; but where a part is only disposed, a consent can imply no more than a *non repugnantia*, seeing it is of use to him to reserve his right *quoad* the subject not disposed. Found, That the consent in this case imports no more than a *non repugnantia*. 11th December 1739, Mr. George Buchan *contra* Sir William Cockburn.

Virtual Confirmation.

ONE having apprised an infestment which was null for want of confirmation, and being publickly infest upon his apprising, the charter of apprising, which passes of course, was not found equivalent to a confirmation of the original infestment. Stair, Gilmour, 16th January 1663, Tenants of Kilchattan *contra* Lady Kilchattan. — The like. Stair, 9th December 1668, Earl of Argyle *contra* Stirling.

Virtual Discharge.

A DECREET-ARBITRAL ordaining to discharge, is equivalent to a discharge *etiam quoad* the assigney. Hope, (*Arbitration*) 10th December 1623, Lord Elphinston *contra* Ord. — A bond to discharge a reversion, was found equivalent to a discharge, in prejudice of a third party. Hope, (*Wadset*) 25th November 1626, Turnbull *contra* Scot. — A bond was found discharged by acceptance of a posterior security in satisfaction thereof. Durie, 6th December 1632, Chisholm *contra* Gordon.

Virtual Precept of *Clare constat*.

AN apparent heir of a vassal, instead of taking a precept of *clare constat*, and infesting himself thereupon, did directly resign in the superior's hand, who granted charter to him as heir to his predecessor, upon which charter he was infest; this was found sufficient; for tho' the instrument of resignation was ineffectual, yet the charter following thereupon to the resigner *qua* heir, was virtually a precept of *clare constat*, & *utile per inutile non vitiatur*. Stair, 20th January 1666, Ld. Renton *contra* Feuars of Coldingham. — But a father having infest his son base, and after the son's decease having directly disposed the same lands to his grandson apparent heir therein; this was found not equivalent to a precept of *clare*, to carry the right that was in the son's person. Home, 26th January 1726, Marquis of Clydesdale *contra* Earl of Dundonald.

Virtual Procuratory.

A PARTY getting a disposition from one who was only apparent heir, and the writ wanting a procuratory to infest him, whereupon the party applying to the bailie of the burgh to cognosce his author heir, and then infest them both, and he refusing, and being instrumented thereon, the party alledging, that the general clause, "To do all that was necessary in the premisses, &c." supplied the procuratory; but another thereafter presenting to that bailie a disposition to the same subject, and containing a procuratory, whereupon the bailie actually infest him: The Lords, in a competition betwixt them, preferred the posterior disposition, because it had the procuratory, which the other wanted, otherwise the requiring the bailie would have been equivalent

to an infeftment, had it not been for the want of that step in the progress. Fountainhall, 16th July 1708, Williamson *contra* Thomson.

Virtual Substitution.

ANY declaration of a defunct's intention is sufficient to establish a substitution in a tailzie, to have, at least, the force of a *fidei commiss.* so as to oblige the heirs at law to make the substitution effectual, by granting a direct conveyance. Home, 13th July 1722, Kennedy *contra* Arburthnot.

Virtual Tack.

IN a process of removing at the instance of a singular successor, the tenant excepted upon the former proprietor's holograph rental book, wherein he was inserted as rented during his life, and offered to prove, that, by the custom of the barony, this was understood to be equivalent to a formal rental; the defence was repelled, for tho' this might bind the master, it was no obligation upon the tenant to continue in his farm for life; and so, not being a real right, could not be good against singular successors. Durie, Hope, (*Rental*) 5th July 1625, Ld. Ayton *contra* Tenants.

A WADSET being only personal by contract, and without charter and sasine, and bearing a clause, "That it should not be lawful for the heretor to redeem, till so many years elapsed;" yet this was not found to be of the nature of a tack, and so not found sufficient to defend against a compriser, or any other singular successor. Durie, 25th November 1628, Hill *contra* Wright.

OBLIGATION to grant a tack, if a virtual tack? See Obligation.

VIS & METUS.

In deeds elicited from a woman testis viro?

A WIFE consenting to the alienation of her liferent-lands, altho' she do not judicially ratify, yet the Lords found, That she cannot reduce *super reverentia maritali*, unless she libel *verum & justum metum*. Haddington, 16th June 1613, Hepburn *contra* Nasmith. Marcus, (*Stante Matrimonio*) December 1683, Marishall *contra* Fergusson. Fountainhall, 16th July 1696, Leishman *contra* Nicols. Fountainhall, Forbes, 28th June 1706, Hay *contra* Cuming. — Neither was *reverentia maritalis*, joined with *luctus & mæror* found relevant, the deed having been granted by the wife, while her husband was upon death-bed. Gosford, 10th, Stair, 24th January 1674, Murray *contra* Jaffrey. — One being bound in his son's contract of marriage to provide the wife in a jointure, her discharge of the same was not sustained, being presumed done *ob reverentiam maritalem*. Durie, 9th January 1623, Marishall *contra* Marishall. — A wife, who was conjunct fiar, having consented to a wadset of the lands set by her husband,

husband ; and, after his decease, having raised reduction *ex capite metus*, and libelling beating, expelling the house, &c. the same was found relevant and sustained, it being *specificce* libelled, as was found requisite, that she suffered the above maltreatments for refusing her consent to the alienation ; and this, tho' at the time of her subscription she shewed no repugnance ; and the onerous purchaser was neither partaker of the violence nor knew thereof. Durie, 27th June 1632, *Cassie contra Fleeming*. — A wife who was proprietrix of some shops in a burgh, having disposed the same with her husband's consent 24 years ago ; and now having raised reduction thereof, as granted *ob metum* of her husband, she never having ratified, and it appearing by the witnesses who deponed, that she seemed backward to subscribe ; and that the husband frowned upon her, and kept her seven hours in a tavern before she did it, and pulled her by the coats, &c. the Lords all agreed, That much less force would repon a woman against a deed than a man ; but then they thought, That the qualifications of force proved were not sufficient, especially where the action was brought at such a distance of time ; and therefore affoizied. Fountainhall, 29th June 1708, *Johnston contra Napier*. — A reduction at a woman's instance who had consented to an alienation made by her husband of her liferent-lands, and which she had revoked after her husband's decease, was sustained *super capite metus reverentialis*, notwithstanding she had ratified the infestment by her oath given in judgment. Haddington, 17th June 1612, *contra*. — A renunciation by a wife of her conjunct-fee-lands, judicially ratified in terms of the act parl. 1481, Cap. 83. found not reducible *ex capite metus*, tho' it was pleaded that the ratification was also extorted *per eandem vim & metum*. Durie, 8th July 1642, *Grant contra*.

A DISCHARGE of an obligation granted by a man in prison or captivity, was found null by exception. Balfour, (*Obligation*) 4th July 1555, *Craig contra Mowat*. — That which is given by a person in ward, to him at whose instance he is imprisoned, is presumed to be given *metus causa* ; and therefore it may be repeted. Colvil, April 1586, *Love contra Downie*. — A bond granted by one in prison to the person upon whose diligence he was imprisoned, will not be sustained, except in so far as the onerous cause can be instructed ; unless it appear that the creditor gave an abatement, and that the bond was truly granted upon a transaction ; in which case the bond will be sustained *in totum*, the transaction inferring a presumption, that the thing was done freely, without coercion. Stair, 18th February 1680, *Burnet contra Ewen*.

A PERSON being taken and detained *in privato carcere* for some time, and thereafter upon a caption detained prisoner, and in that condition transported to divers places in the night time, and threatned with long imprisonment, and in end being thereby prevailed upon to dispose some lands ; the Lords found the libel and qualifications of force relevant : And there being a defence proponed, That there was no *damnum*, the party by an antecedent minute being obliged to dispose the lands ; the Lords repelled the same, and would not allow that point of fact to be tried. Dirleton, Stair, 10th January 1677, *Stewart contra Whiteford*. — A man being treacherously taken by for-

ners and out-laws, and kept in close captivity, under fear of his life every hour, transacting with one of them, to give him bond for a sum, and promising the same upon oath, he always procuring his escape; which being accordingly performed with the hazard of the former's life, who also made his own escape with him; and the party within a few days thereafter giving him his bond for the sum promised, and afterwards paying part thereof, and renewing the bond for the balance: Upon a charge given him on the new bond, and a suspension upon the reason of *vis & metus*, and the *turpis causa* of the bond, the reason was repelled, and the bond sustained, because the charger had hazarded his own life in helping to set the suspender at liberty, and fled away with him. Durie, 12th February 1642, Grant *contra* Leslie.

Deed granted while the party is under a formal caption; And *imo*, Corroboration, or further security of the debt.

A DEBITOR, being apprehended by caption, gave bond of corroboration of the debt, obliging himself never to suspend the same, this not being *injustus metus*, the bond of corroboration was found valid; and therefore the debtor suspending upon compensation, it was not sustained, tho' the compensation was otherwise unquestionably relevant. Stair, 28th June 1672, Murray *contra* Spalding. — A similar case. Stair, 2d December 1675, Thomson *contra* Moubray. — Upon a decret recovered by a minister against his heretors, for a certain sum paid out by him for repairing the manse; one of the heretors being taken with caption, gave bond for L. 80 Scots, as his proportion. In a suspension upon this reason, That he was over-rated, and that his proportion, according to the valuation of the parish, would not exceed a third part of that sum; the Lords found the letters orderly proceeded, because the caption was a lawful diligence, and granting the bond was a transaction. Stair, 22d January 1667, Mair *contra* Stewart. — A bond granted in corroboration of a decret in absence, when the party was under caption upon that decret, was found no homologation of the debt, in case the bond was for the whole sum contained in the decret; otherwise, if he got an abatement. Stair, 3d July 1668, Rue *contra* Houston. — The like. Marcus, (*Homologation*) June 1688, Whiteford of Blairquhan *contra* Murie. — A decret upon the passive titles having been taken out against a minor *indefensus*, and after majority he having been taken with caption for payment of the debt, and having granted a bond of corroboration; in a suspension of the same it was objected, That tho' the debt might be just, the suspender was not liable upon the passive titles; the decret was in absence, and the bond of corroboration was granted without abatement, and must be presumed extorted *metu carceris*. It was answered, The presumption must rather ly, that the suspender granted the bond of corroboration, being conscious that he was liable upon the passive titles, when he had so easy remedy against the diligence, by a suspension of the decret in absence, before the caption was put in execution, or by a liberation afterwards. The Lords found the letters orderly proceeded, and that *metus carceris*, by a legal execution, which could have been prevented, was no *justus metus*. Dalrymple, 3d, Fountainhall, 7th December 1698, Ker *contra* Edgar. — The like. Fountainhall, 9th December 1698, Rutherford *contra* Murray.

2do, Where separate deeds are granted not relative to the debt in the caption.

A TENANT being under caption for his rent, the Lords found, That whatever was done in relation to the grounds of the caption, could not be said to be done *ex vi & metu*; yet that the following extrin-

sick

sick deeds, elicited from the poor tenant, *viz.* a disposition of his whole moveables for security of the rent for the years to come, and an obligation to find a cautioner; were null, as being *vi & metu* extorted while he was under caption. Falconer, 29th November 1681, Home, March 1682, Heriot *contra* Bird. --- A party under caption, and at the tolbooth door, having granted a bond of corroboration, and likewise a discharge of a decret he had against some of the charger's tenants; the Lords, in a suspension, found, That whatever security he gave for the debt contained in the caption on which he was taken, the same could never be quarrelled *ex capite vis & metus*, as being legally done; but to extort a discharge of an extraneous debt without an onerous cause, they found it utterly unwarrantable, and reducible *ob vim & metum*: Further, as to the discharge, the charger having offered to give it back, they found that the doing so was not sufficient, unless he also procured a consent from the tenants, and if not, then ordained the sum in the discharge to be deducted off the bond charged on. Fountainhall, 18th December 1708, Nisbet *contra* Stewart.

A CAPTION having been irregularly put in execution, after the debt was suspended, and the debtor, in virtue thereof, being dragged out of his house by an armed force, and carried to a remote place, a bond of cautionry granted in these circumstances by the debtor's sons, to save, for ought they knew, their father's life, was found null. Stair, Gosford, 8th December 1671, M'Intosh *contra* Spalding. --- A sheriff-depute having fined an heritor for divers absences from head-courts, and having summarily poinded the tenants for the amercement, the Lords thought that this procedure was precipitant, being without a previous decret of poinding; and without deciding whether these unlaws were *debita fundi*, they found the poinding illegal, and the bond granted to stop it, null, and reponed the master and tenants to their defences. Fountainhall, 18th July 1700, Dundas *contra* Hardie.

THE Lords reduced a resignation *ad remanentiam* of an Earldom, only because, upon the Earl's refusal to resign, the King had commanded him to prison at a good distance from his dwelling. Sinclair, 12th April 1543, Earl Morton *contra* Ld. Lochleven. --- The exception of *metus* was sustained upon no stronger qualification than boisterous words, the power of the party and other circumstances justly moving the defender to yield for eviting present danger. Haddington, 21st February 1606, Vinfra *contra* Earl Orkney. --- In a reduction of a disposition of lands upon the head of concussion, the Lords sustained the following condescendance as relevant, That the defender was then a Lord of session, and otherwise known to have been in great power; that he had raised an improbation of the pursuer's rights, and when production was made, that he had taken up the papers, and refused to return them; that he had entred to the possession even before he got the disposition; and lastly, that it was *læsio ultra duplum*. Our author adds, That the Lords had in view to discourage great men from oppressing their poor neighbours. Fountainhall, 22d February 1688, Gray *contra* Earl Lauderdale.

W A D S E T.

Proper and
improper.

LANDS being disposed for security of a sum definite, "declaring
" the same redeemable upon payment of the principal and annu-
" alrents that should be resting." This was found an improper wad-
set, because here there was no *anticbresis*, that is, the rents were not
to go in place of annualrent, but the wadsetter bound to accompt for
his intromissions. Dirleton, 8th December 1666, Urquhart *contra*
Cheyne. --- In a bond for borrowed money, there being a clause wad-
setting certain lands, "to be possessed by the creditor for the annual-
" rent of the sum, so long as the sum should remain unpaid:" This
was found a proper wadset, and consequently that the wadsetter had
no claim for annualrent, tho' the yearly profits of the land fell short
thereof. Dirleton, 17th June 1675, Heckford *contra* Ker.

Wadsetter's
power of set-
ting tacks.

A WADSETTER cannot set tacks to endure longer than his own
right. Maitland, 25th February 1567, Home *contra* Kennedy.

Offer of se-
curity for the
annualrent of
the wadset
sum.

IT being provided by act 62d, parl. 1661, "That if the debtor
" shall give sufficient security to the wadsetter for payment of his
" annualrent, the wadsetter shall quit his possession, or if he retain the
" same, that he must accompt for the profits;" and, in terms of
this clause, security being offered, the wadsetter, who continued to
possess, was found liable to accompt from the time the offer was
made, tho' the process for payment of the superplus rents, over and
above the current annualrent, was not raised for several years thereaf-
ter. Gosford, 16th June 1671, Lord Lovat *contra* Lord M'Donald.
--- But wadsetters are not accountable for any profits that arise before
the date of the offer. Stair, 21st February 1666, Lord Borthwick
contra Wadsetters. Stair, *eodem die*, Ogilvie *contra* --- In or-
der to restrict the rents of the wadset to the annualrent, security needs
only be offered for the annualrent, the investment being a sufficient se-
curity for the *fors*. Marcus, (*Wadset*) March 1683, Earl Ma-
rischall *contra* Wadsetters. --- But it was not found sufficient that cau-
tion was offered in general, seeing a bond was not offered with a cau-
tioner, nor indeed any particular cautioner condescended on at all.
Fountainhall, 18th July 1694, Ramsay *contra* Clapperton. --- In the
above act towards the close, it is provided, "That wadsetters, who are
" in the natural possession, shall not be bound to remove even after
" security is offered, until they be also warned, in ordinary form, 40
" days before Whitsunday." Upon the footing of this clause, a wad-
setter in the natural possession, was assilzied from compting, who was
not warned after the offer of security was made to him. Stair, 20th
February 1679, Bruce *contra* Bogie. --- In the like case, the Lords con-
sidered that there were two cases presupposed in this clause, one, where
the wadsetter, willing to yield possession, accepts of the offer of secu-
rity; there his acceptance puts him upon the footing of a tenant, to re-
move whom warning is necessary: The other case is, where the wad-
setter refuses the offer, choosing rather to continue in possession; here
warning would be to no purpose: And therefore they found a wadset-
ter, who, by refusing the offer of security, declared his intention of re-
taining

taining possession, liable to accopt, tho' he was not warned. Forbes, 21st, Fountainhall, 26th December 1710, Earl Leven *contra* Morison. — During the dependence of a compt and reckoning upon a wadsetter's intromission, who continued in possession after the offer of security, the reverser, apprehensive that he was overpaid, insisted that the wadsetter being *obærat*, he ought either to give security for the sum that should be decerned against him in the event of the compt and reckoning, or cede possession and take security for what should be decerned in his favours; the Lords refused to oblige him to do either, for they considered that this was a correctory law, and could not be extended. Fountainhall, 22d January 1697, Earl Marischall *contra* Cargil.

ALTHO' when a man alienates lands to be holden of himself, he needs no new sasine after redemption, because he remains in the radical right; yet if the alienated lands be holden of the reverser's superior, the Lords found, That he must be again infeft upon redemption, except the same be taken holden of the superior by comprising; because in that case the proprietor redeeming within seven years, needs no new sasine, the law presuming him to have remained still seased when he redeems within the legal. Maitland, 10th February 1569, Maxton *contra* Maxton. — In a declarator upon an order of redemption, the wadsetter's apparent heir appeared, and craved the sum consigned to be delivered to him, alledging the declarator to be a sufficient security to the redeemer without renunciation or resignation of the wadsetter; the lands were found in this case to be redeemed, but the money was ordained not to be given up till the apparent heir should infeft himself as heir to his father, and resign; for the Lords thought the redeemer ought to be put to no hazard of repetition. Stair, 10th January 1665, Campbell *contra* Bryson.

Form of re-investing the reverser upon redemption.

EIK to the reversion. See Personal and Real.

USURIOUS stipulation in wadsets. See Usury.

TACK commencing after expiry of the wadset for a less duty. See Usury.

ORDER of redemption. See Redemption.

APPARENT heir using requisition, and serving thereafter. See Quod ab initio vitiosum.

WADSETTER must resign upon redemption, tho' not expressed in the contract. See Implied Obligation.

WHEN the wadset is loosed, and the wadset sum becomes moveable. See Right in Security.

IMPROPER wadset extinguished by intromission, requires not declarator. See Declarator.

W A R D.

Ward hold-
ing under-
stood, where
the contrary
is not expref-
sed.

A CHARTER, bearing, *Reddendo servitia debita & consueta*, was found to import service of ward and relief; but where it bore, *Ad formam & tenorem antiquæ chartæ*, there the original charter was found to be the rule. Balfour, (*Holding*) 6th February 1605, the King *contra* Hay. ---- Lands paying *sex denarios argenti nomine canæ*, were interpreted to be holden ward. Haddington, February 1610, *contra* . ---- A clause of *reddendo* in a vassal's charter being thus conceived, *Reddendo sedecim nummos ad duos anni terminos festo, viz. Pentecostes & sancti Martini, una cum servitiis in curiis nostris & alibi debitis & consuetis*; the Lords found the holding to be ward. Hope, (*Feus*) Haddington, 11th November 1614, *contra* . ---- In an action for the double avail of a marriage, the Lords found an infeftment conceived thus, *Solvendo octo solidos sterelinos tantum pro omni alio onere, warda, relevio, &c.* relevant to infer a tax-ward, altho' it made mention of no kind of holding. Hope, (*Feus*) 27th June 1616, Earl of Angus *contra* Ld. Billy. ---- A holding was found to be ward, tho' besides *servitia debita & consueta*, it expressed a sum of money. Fountainhall, 14th January 1696, Ld. of Carnwath *contra* Creditors of Nicolson.

Voluntary
rights not good
against the
ward.

THE ground cannot be pointed by an annual renter during the ward. Durie, Auchinleck, (*Ward*) 21st March 1629, Weemyss *contra* Ld. Kincaigie. ---- A servitude of thirlage constituted by a vassal, was not found to prejudice the superior in possession of the lands by his casualty of ward. Stair, 11th December 1666, Earl Cassils *contra* Tenants of Dalmorton.

TACKS sleep during the ward, but then the tacksmen are intitled to have the time he loses by the ward made up to him afterwards. Maitland, 6th December 1570, Cunningham *contra* Crawford. Haddington, 4th July 1611, Ld. Culter *contra* . ---- In an action for mails and duties at the instance of a donatar to a ward against a tenant, found, That a tack in the defender's person clothed with possession, was sufficient to exclude the pursuer for any greater duty than what was contained in his tack, for all years preceeding the date of the summons the defender never having been interrupted before. Durie, Spotiswood, (*Ward*) 13th March 1627, Ld. Ley *contra* Ld. Bar.

Courtesy ex-
cludes ward.

THE lands of a minor, son of an heiress, cannot fall in ward during his father's courtesy. Balfour, (*Ward*) penult. February 1553, George Gorthie *contra* Lord Methven.

Terce.

TERCE excludes the casualty of ward. Sinclair, 2d March 1541, Gourly *contra* Spence. Colvil, 17th December 1577, Ld. Glenbervie *contra* .

Apprising
good against
the ward.

FOUND, That an appriser infeft, tho' the ward falls not by his death but by the death of the debtor, will yet exclude the superior, and be preferable to the donatar of ward, just as much as an infeftment of annual rent confirmed by the superior, because tho' infeftment be given

given by the superior in obedience only, yet it is in obedience to the law; and a strong argument was drawn from analogy of the act, allowing ward-lands to be set in feu, which feus by constant practice are held to be good against the ward, so that the donatar can draw nothing but the feu-duties. 24th July 1739, Donatar of ward *contra* Creditors of Bonhard.

A LIFERENT infestment granted to a wife to be holden of the superior, and confirmed by him, excludes the ward, because the lands are full; which was found competent to be pleaded by the subvassals against the liferentrix herself, who had a gift of the ward from the superior. Durie, 7th July 1629, Lady Cathcart *contra* Tenants. Haddington, 25th July 1623, Hay *contra* Cuninghame.

A liferent infestment confirmed excludes ward.

WARDATAR of old had the keeping of the pupil. See Tutor and Pupil.

WARD in what cases excluded by the superior's confirmation. See Confirmation.

WHEN the ward is excluded by terce, courtesy, &c. can this be proponed by third parties? See Jus tertii.

WARRANDICE.

A CLAUSE of warrandice, "against all deadly as law will," contained in an assignation of a bond, was found not to extend to the solvency of the debtor. Stair, 16th June 1664, Hay *contra* Nicolson. — A clause of absolute warrandice contained in an assignation to a bond, "warranting the right to be good, valid and effectual at all hands," does not import that the debtor was solvent the time of the assignation, but only that the debt is good in law, and above all exception. Stair, Gosford, 24th November 1671, Barclay of Pearston *contra* Liddel. — The like, where the assignation not only bore absolute warrandice, but also that the sums assigned should be "good, valid and effectual," because in general the solvency of the debtor is never understood warranted, and therefore must be expressed. Stair, 12th December 1671, *inter eosdem*. — The case is a little different as to real debts, in disposing of which the land is understood to be the principal if not the only debtor; and to say the land is not *locuples*, is in other words to say, that the debt will be excluded by preferable rights, which comes out the same, as if the debt were not at all a burden upon the land; and therefore the Lords found a clause of absolute warrandice in the conveyance of an infestment of annualrent, does import that the same shall be effectual against the land. Dirleton, 9th February 1675, Burd *contra* Reid. — In a pursuit for the price of an apprising, which, with its grounds, was disposed with absolute warrandice, the defender objected, That the apprising was not a profitable right, the worth of the lands appraised being exhausted

Absolute warrandice in conveyance of real and personal debts.

by preferable rights and diligences ; the Lords sustained the defence, and affoizied. *Harcus, (Warrandice)* March 1683, *Fife contra White*. — But thereafter it appearing from the assignation produced, that the bond was principally assigned, and the apprising only in consequence, that the appraised lands were not at all disposed, and that the clause of warrandice did not warrant the apprising in special, but only the assignation in general ; the Lords found in this special case, That the warrandice did import only *debitum subesse*, because here the personal bond has been principally in view of the parties. *Harcus, ibid.* November 1683, *inter eosdem*. — Formerly it had been found, That absolute warrandice in the conveyance of an apprising did only import the formality of the diligence, and reality of the debt. *Dirleton, 10th November 1666, Bowie contra Hamilton.*

Absolute warrandice in conveyance of rights of property.

ABSOLUTE warrandice was not found incurred, tho' the lands came to be distressed by a bond of thirlage granted by the seller's author, affricting the lands to the mill of the barony ; which was found in this circumstantiate case, because the thirlage was but light, and that it was obvious to the buyer to know or enquire whether the land, being part of a barony, was thirled to the mill or not ; but the Lords did not determine that no thirlage could infer warrandice. *Stair, Dirleton, Gosford, 21st June 1672, Sandilands contra Earl of Haddington*. — One who had disposed lands being quarrelled upon an alledged eviction, *viz.* a servitude of casting peats granted by his authors, *anno 1625*, the Lords affoizied, in respect the servitude was old and notourly known, and an inconsiderable burden, in that part of the country where mosses are frequent. *Harcus, (Warrandice)* Home, March 1682, *Paton contra Gordon*. — Found, That churchlands being disposed with absolute warrandice, the disposer is bound to warrant from the designation of a glebe, tho' it was alledged, That *ex natura rei*, and not *ex defectu juris*, the glebe was evicted. *Gilmour, July 1663, Elphinston contra Lord Blantyre*. *Dirleton, 15th July 1667, Watson contra Law*. *Falconer, 20th February 1683, Bonnar contra Lyon*. — The contrary. *Stair, 1st July 1676, Ld. Auchintuil contra Ld. Innes*. — Absolute warrandice in an assignation to a tack of teinds, does not make the disposer liable for a supervenient burden of augmentation of stipend to the minister, because stipend is a natural burden upon teinds. *Harcus, (Teinds)* 6th January 1682, *Lumisdan contra Gordon*. — The warrandice of a tack of a house, importing, That there should be no eviction, nor pretender to the property or possession to disturb or dispossess the tenant ; the Lords found, That this did not extend to a mere accident of a neighbour's building, which tho' it incumbered the entry to the house, yet did not totally obstruct it. *Fountainhall, 23d June 1680, Peirs contra Black.*

Warrandice from fact and deed.

WARRANTICE from the cedent's fact and deed secures not from falsehood, to which the cedent was not accessory ; the assigney must run all hazards, except from the cedent's fact and deed. *Stair, 14th December 1678, Dick contra Blairs*. — In a minute of sale, the seller having bound himself that neither he nor his heirs had done or should do any deed prejudicial thereto ; and the eldest son, long before the minute, (in which he was not a party) having disposed to a third party

party a preferable right he had to the subject, whereby the lands came to be evicted; in a pursuit against the son upon the passive titles to make good his father's warrandice, the Lords found the warrandice incurred. Durie, 9th July 1630, Hay *contra* Ld. Philorth. — A charter of apprising being granted by a subject superior, with warrandice from his fact and deed, a clause unusual in charters when granted merely in obedience to the law; and the superior's heir afterwards challenging the apprising, upon this footing, that the debtor was not proprietor of the lands, but that the lands belonged to the superior who granted the charter, property as well as superiority; the Lords found the clause of warrandice behaved to have this effect, that the superior or his heir could not quarrel the apprising. Forbes, 6th January 1710, Glendinning *contra* Irvine. — Warrandice from fact and deed entitles the purchaser to seek relief of the publick burdens due out of the land before the date of his right, tho', properly speaking, not arising from the fact or deed of the disponer, but from his omission only. Gosford, 25th June 1669, Haliburton *contra* Hunter.

WARRANDICE from fact and deed adjected to a disposition *mortis causa*, of all debts and sums of money, does not free the disponent from being liable to the defunct's debts; for a disposition of an *universitas* must pass *cum suo onere*, and the warrandice is only meant to guard against future gratuitous alterations. 19th February 1735, Peacock *contra* Forbes. — A father disponed his estate to his eldest son, reserving a power, "to burden it with a certain sum for provision to his bairns and other lawful affairs," with a clause of warrandice *from his own fact and deed allenarly*: Notwithstanding of this clause of warrandice, it was found, That this faculty was not exhausted by the father's anterior debts, but that both were burdens upon the son; it being pleaded that such clauses of warrandice contained in gratuitous dispositions, where nothing is intended but to give the right *talis qualis*, are not understood to guard against prior debts, especially in this case, where the father reserved only a liferent of part of the lands, no more than sufficient for an aliment. Stair, 11th December 1679, Creditors of Mousewall *contra* the Children.

A WIFE having infestment in certain lands for her jointure, to the extent of a particular sum, with infestment of warrandice upon other lands, in case the said first lands should be found less worth than the sum of the jointure, has no right of recourse to the warrandice lands against a singular successor, where it can be proved that the principal lands were, for ten years before, and many years after the wife's infestment, worth the sum of the jointure; for it will be presumed, that any decay of rents in such case is owing to the widow's misgovernment, or to some common calamity by the badness of seasons, against which no warrandice takes place. Durie, 10th March 1636, Lady Dunnipace *contra* Lauristoun.

Warrandice
that lands shall
be worth so
much yearly.

No warrandice being expressed in a contract of alienation of lands, was found to import absolute warrandice. Colvil, May 1583, Ld. Kinfauns *contra* Ld. Craigie. — By a minute of sale one became bound to give a valid and ample disposition of an adjudication in his person, and the other to pay a certain sum for the same: The purchaser raised a reduction of this minute, alledging that the adjudication

Implied
warrandice.

was informal and null. The Lords found the seller not obliged to warrant the formality of the adjudication. Fountainhall, 23d December 1698, Bothwell of Glencorse *contra* Prestons. — An assignation being granted to a decreet, bearing for onerous causes, but wanting a clause of warrandice, the Lords found that this could not be interpreted to imply absolute warrandice, but only from fact and deed, which is the common and natural warrandice inserted in assignations to debts and decreets; for the brocard, That where no warrandice is expressed, absolute warrandice must be understood, can only be applied according to the nature of the right, that is, if it be a sale of lands for adequate onerous causes, then it holds, but not in assignations to personal rights. And here it being further objected, That even such a warrandice should, at least, import that *debitum subest*, whereas here there was no debt at all, the debtor on his being reponed to his oath, deponing *negative*; yet this was not regarded, because, at granting the assignation, there was a decreet standing, tho' afterwards annulled, & *sententia judicis pro veritate habetur*, till it be reduced and taken away. Fountainhall, 4th March 1707, Riddel *contra* White. — Warrandice from fact and deed is implied even where the assignation is a pure donation. Hope, (*Warrandice*) 9th January 1621, *contra* . — An assignation made to all right and title the cedent has to teinds containing no warrandice, tho' it be for onerous causes, will not oblige the cedent to warrant a null tack made to him of the said teinds, the said tack not being made mention of in the assignation. Haddington, Hope, (*Warrandice*) 13th February 1612, Lord Sanquhar *contra* Tutor.

Warrandice
against the ca-
sualties of su-
periority.

FOUND, That ward, relief, and nonentry, are not understood to be comprehended under general warrandice, but must be specially expressed, because these casualties belong to the superior by the law of the land, from which no man is exempted, and ought to be so known by all the lieges; and therefore *sibi imputet emptor*, who took not care to have the warrandice special. Balfour, (*Warrandice*) 28th May 1549, Ld. Dencinan *contra* Stewart. — A wadsetter of ward-lands having deceased, and his heir having procured the gift of his own ward; the Lords found the reverser was not liable to warrant against this casualty, not even so much as to refund the composition paid for the gift. Marcus, (*Ward and Marriage*) February 1687, Agnew *contra* Agnew. — A superior being bound to warrant his vassal against wards *per expressum*, this was found only to comprehend wards already fallen. Stair, 15th February 1665, Boyd *contra* Tenants of Carluith. — In feu contracts there was a special clause, "That because the granter held the lands ward; therefore he obliged himself to relieve the feuars of any ward that should fall in time coming;" the granter of these feus having thereafter alienated his superiority, and the lands falling in ward, by the death of the singular successor, the clause of warrandice was found to be incurred. Here it was argued for the granter of these feus, That he had obliged himself in that clause of warrandice only *qua* superior; and he being denuded, the obligation ceases of course. Stair, 1st July 1668, Colquhoun *contra* Stewart.

THE casualty of marriage never understood to be warranted against; and therefore a feu vassal, whose right was after the act 16. parl. 1633, being pointed for the avail of his superior's marriage, was found entitled to

to no relief. *Harcus, (Ward and Marriage)* January 1686, Major Buntin and Drummelzier *contra* Murray of Stanhope.

TACKS do not fall under a clause of warrandice, unless the clause be expressed to that purpose. *Balfour, (Warrandice)* 14th March 1565, *Simpson contra* Young.---A woman being provided in her contract of marriage to the liferent of lands, which long before had been set in tack for small tack-duties; in a process against her husband's heir, the Lords found the warrandice not incurred, seeing tacks were not guarded against *specific*. *Durie, 19th June 1629, Lady Pitferren contra* her Son.

Against
tacks.

ABSOLUTE warrandice in a sale of lands, found not incurred by a partial eviction of the property, which happened upon a supervenient law, being a designation of part of the land to the minister for grafts, in terms of the 21st act parl. 1663. *Stair, 12th, Dirleton, 15th July 1667, Watson contra* Law. --- A Lady in her contract of marriage having, in name of jointure, got a right to teinds, which the husband was obliged to uphold, according to a rental specified in the contract; and two chalders of the teinds being evicted from her by the commission of parliament to augment the minister's stipend, the husband's heir was found liable in warrandice, tho' the eviction was upon a supervenient law, because of the express tenor of the clause of warrandice. *Durie, 28th July 1635, Lady Cardross contra* Lord Cardross. --- In the like case, the husband having infest his wife in lands, stock and teind, which he obliged himself should be worth to her twelve chalders of free victual, his heir was found liable to relieve her of the annuity imposed by the commission of teinds, tho' this was by a supervenient law, in regard the lands were not worth twelve chalders, over and above this burden. *Durie, 7th July 1637, Lady Balbegno contra* Ld. Balbegno.

Where the
eviction hap-
pens by a su-
pervenient
law.

WARD lands being recognised in default of the buyer, who took sasine before he obtained the superior's consent, was found not to be a distress against the seller, tho' he was obliged to infest the purchaser as freely as he was himself. *Haddington, 1st February 1610, Otterburn contra* Moubray. --- He who has a tack of teinds set to him for 19 years, and his entry to be at the date of the tack, not apprehending possession thro' his own default during his lifetime, his heir will not get warrandice against the setter or his heirs, but only for the years that the setter or his heir uplifted the teinds. *Haddington, 27th June 1612, contra* .--- A person having granted a tack of teinds with warrandice, and thereafter another tack of the same teinds to another person who attained possession; the Lords sustained action of warrandice against him, at the instance of the first tacksmen, altho' the want of possession was owing to the pursuer's own neglect; but the defender was not admitted to make this allegation, who had granted double rights. *Durie, 6th March 1623, Hamilton contra* Sharp. --- The like was found, where a party had granted double rights of lands. *Fountainhall, 2d February 1710, Hepburn contra* Dutches of Buccleugh.

Eviction
happening by
neglect of the
purchaser.

LANDS which were sold with warrandice from fact and deed alterably, being evicted, but not thro' default of the disponent, the purchaser brought an action, not upon the warrandice, which was not incurred, but upon this ground of equity, That, if he has lost the land, he ought to have the price.

If upon evi-
ction the war-
randice is not
incurred, there
can be no re-
petition of the
price.

ought at least to have repetition of the price. It was answered, That when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is, to sell what title and interest he has in the subject, the purchaser takes upon himself all other hazards; and therefore if eviction happen otherwise than thro' the fact and deed of the disponer, he bears the loss. The Lords assilzied. January 1732, Craig *contra* Hopkin. ---- The same was found with regard to a conveyance of a personal bond, to which the cedent himself had right by progress. Forbes's MS. 11th June 1714, Ross *contra* Inglis.

Eviction by process, if it must be intimated to the seller?

To found an action of warrandice, it was found sufficient that the purchaser acquainted the seller of the depending process of eviction, tho' a formal instrument was not taken. Nicolson, (*Suspension*) 6th July 1620, Lyon *contra* Dunlop. ---- Warrandice was sustained, tho' the eviction was not intimated to the person bound in warrandice, unless he could instruct a relevant exception that might have defended against the eviction. Stair, 23d June 1681, Clark *contra* Gordon.

Eviction without process.

In a sale of teinds, with absolute warrandice, it was found, That the teinds were affected with a certain locality to the minister; the purchaser thereupon insisting in an action of warrandice, it was objected, that there was no legal distress, but voluntar payment made to the minister of every year's locality since the purchase; which was repelled, seeing the distress was unquestionable, and therefore payment made without process prejudged not. Stair, 4th February 1662, Lord Melvil *contra* Ld. Fairin.

Where eviction is imminent.

FOUND, That a simple decret of reduction upon an inhibition for not production, was no sufficient distress to infer recourse, seeing the party ought to have produced and defended, because there might be nullities in the execution of the inhibition. Fountainhall, 13th March 1685, Ferguson *contra* Ferguson. --- Lands being disposed by a vassal with consent of his superior, and both of them being bound in warrandice to the buyer in general, and also specially bound to warrant against a prior comprising and inhibition; the Lords ordained, in an action of warrandice, the superior to purge the said rights, altho' the charger was not troubled in his possession, seeing the same were such rights as might prejudice his bruiking, being anterior to him, and that the comprising, whenever sasine should follow, would make him comptable for the mails of the lands since the date thereof; only their Lordships superseded execution to a certain day, that betwixt and that time the superior might remove the impediment. Durie, 1st July 1624, Lord Frendraught *contra* Ld. Balveny. ---- Found, That dependance of a process against lands excambed, was a distress, so as to found an action of recourse; but execution upon the decret of recourse, was superseded till the lands were distressed by sentence. Gilmour, 21st January 1663, Earl Home *contra* Earl Lothian. ---- A man having granted double rights to the same subject, the eldest whereof reserved his own and his wife's liferent, but with absolute warrandice; the Lords sustained a charge for the warrandice, altho' there neither was nor could be a present distress, because of the reservation aforesaid; for the Lords found a difference when warrandice is craved upon a deed of the party

ty obliged, and upon any other ground; and that as to his deed he may be charged to purge it, without necessity to alledge a distress. Stair, Dirleton, 17th July 1666, Burnet *contra* Johnston. --- Recourse was sustained upon a clause of warrandice for satisfaction of the pursuer's prejudice, tho' there had not happened any actual eviction, the cause inferring eviction being evident and clear, and occasioned by the deed of the party warrantor, who granted double dispositions. Gosford, 14th, Stair, 17th February 1672, Smith *contra* Ross. --- In an action of warrandice against a person who had granted double rights; the Lords decerned in warrandice, but this only *declaratorie juris*, so as no execution was to pass against the defender till a decreet of eviction was obtained against the pursuer. Fountainhall, 2d February 1710, Hepburn *contra* Dutchess of Buccleugh.

ONE having sold an apprising with warrandice from his own proper fact and deed, and "That the sums were truly due, resting and owing; " the apprising being afterwards found null, and the warrandice incurred, but without any fraud or fault of the disponer, the warrandice was only extended to a repetition of the purchase-money *cum omni causa*, not to the sums in the apprising. Stair, 28th February 1672, Earl of Argyle *contra* Ld. Ayton. --- In a case of contravention of warrandice of a disposition to a wadset of 11000 merks, by granting another disposition, which inferred double alienations; the Lords modified 20000 merks of damages. Fountainhall, 10th June 1687, Smith *contra* Ross. --- In eviction of whatever subjects, rights in security, lands, &c. the recourse upon warrandice is not restricted to the sum paid for the purchase, but reaches to the real worth of the subject evicted, as it is the time of the eviction. Home, 22d February 1717, Houston *contra* Corbet.

Warrandice incurred, how far extended?

A PURCHASER insisting for possession of the warrandice-lands, the principal lands being partly evicted by a wadset, he was found to have access to the full rents of the warrandice-lands, applying the superplus, more than the annualrent of the wadset-sum, for payment of the principal. Gosford, 21st, Stair, 22d July 1675, Menzies *contra* Campbell. --- The like. Haddington, 27th January 1604, Bruce *contra* Ld. Pittencrief. --- There being a depending process of poinding the ground upon an annualrent-right, against which the purchaser was specially warranted; and he insisting against the feller, either to purge the incumbrance, or that a sum should be modified by the Lords, as the true worth and value thereof, whereupon he might comprise for his relief; this conclusion, tho' a novelty, was found relevant. Auchinleck, (*Annualrent*) 25th, Durie, 26th June 1635, Grieve *contra* Hepburn.

PURCHASER transacting the ground of eviction, what claim has he against his author bound in warrandice. See *Mutual Contract*.

W I T N E S S .

IN an exhibition of a bond, the Lords received witnesses who were seconds of kin to the pursuer, *veritatis rimandæ causa*. Hope, (Witness) February 1611, Gaws *contra* Dalgleish. --- The Lords If relations can be witnesses? And, I mo, To what de-Lords gree rejected?

Lords received a witness who was second of kin to one of the parties. Hope, (*Witness*) 26th November 1611, Earl Lothian *contra* the Captain of Crawford. — But a cousin-german cannot regularly be admitted, nor a brother-in-law; which last was found, tho' the party's sister was dead who made the tie betwixt him and the witness. Stair, 15th January 1679, Brown *contra* Town of Kirkcudbright. — A person who was a subscribing witness to a disposition granted in favour of his nephew, quarrelled *ex capite lecti*, was refused to be admitted as a witness for the nephew, to prove that the disponent was in *liege poustie* when he granted it. Forbes, 19th June 1713, Creditors of Orbiefton *contra* Hamilton. — It being objected, That one of the adducer's witnesses could not be received, as being his uncle-in-law, the Lords repelled the objection. Bruce's MS. 30th November 1716, Moncrief *contra* Town of Perth.

2do, Bastards. IT was questioned, whether a bastard could be a witness for his kinsman, because the law makes him no blood-relation; yet, on the other hand, experience teaching, that they commonly bear as strong affection as children lawfully begotten; therefore in a case where there was no *penuria testium*, the Lords refused to allow such a person witness for his kinsman. Haddington, 6th November 1610, Ld. Leyes *contra* Ld. Drum. — The like. Haddington, December 1610, Aikman *contra* Somervell. — A bastard allowed to be examined as a witness for a kinsman on the father's side, because the father of a bastard is understood in law to be uncertain. Durie, 6th November 1624, Ld. Bonnington *contra* Crawford. — Found, That a bastard, who is of kin by the father's side, may be received as a witness, as not being at all of kin in the construction of law; but that he may be repelled if of kin by the mother's side, she being always certain. Haddington, Erskine, 22d November 1622, Grant *contra* Ballindalloch.

3to, What if related only to one of many who have a joint interest? THE Lords rejected a witness adduced at the instance of several parties who had a joint interest, being son-in-law to one of them, tho' he was not related to the others. Fountainhall, 26th February 1685, Erskine *contra* Robertson.

4to, What if related to one who has but an indirect interest? ALTHO' a party was not the pursuer in a cause, but only solicitor and maintainer thereof, and managed it on his own charges; yet those within degrees to him were repelled as witnesses. Sinclair, 16th May 1542, Dobie *contra* Ld. Glenbervie.

5to, What if the party's interest be small? IT being objected against a witness in the proving the tenor of a charter, That he was brother to the receiver of the disposition, who tho' he had absolute warrandice, yet did not desire to lose his policy and planting, or to be put to recur on his warrandice; the Lords rejected the witness. Fountainhall, 12th February 1686, Douglas *contra* Fraser.

6to, What if related to both parties? WITNESSES within forbidden degrees to a pursuer were repelled, altho' they were in the same degree to the defender. Sinclair, 16th February 1542, Dickson *contra* Veitch. Balfour, (*Witness*) 16th February 1541, Gibson *contra* Waugh. Haddington, 9th January 1616, Maitland *contra* Cranston. — An objection being made against a witness, That he was of kin to the adducer, and it being replied, That he was nearer of kin to the defender; the exception nevertheless was found relevant. Haddington, February 1609, Kinrofs *contra* Graham. Haddington, 22d November 1622, Grant *contra* Ld. Ballindalloch.

lindalloch. Hope, (*Witness*) June 1610, Ld. Lochleven *contra* Cranston.

IN a process of adherence before the commissaries, the pursuer's brother, with her sisters and their husbands, were admitted *cum nota* to prove the marriage, for this reason, That as private marriages are not put *extra commercium*, no witnesses can well be depended upon but the nearest relations; upon which a bill of advocation presented to the Lords was refused. *ult.* July 1732, Sybilla Barber *contra* Stewart.

A WITNESS being adduced upon a fact done *tempore pestis, quando erat penuria testium*, and the witness being *omni exceptione major* the Lords received him *ex officio*, tho' he was uncle to the party adducer. Haddington, *penult.* May 1610, Inglis *contra* Wilkie. --- The Lords refused to receive near kinsmen as witnesses, except where there was a *penuria testium*, and great appearance that for want of probation the cause would perish; in which case they ordained the party to give his oath in presence of those who knew the matter. Haddington, 11th January 1611, Dalgleish *contra* Gaw. --- In a reduction on minority, the pursuer's mother was received witness of the pursuer's age *cum nota*, there being a testificate already produced, and 30 or 40 years since the pursuer's birth, which would occasion a *penuria testium*; but she was ordained to depone who were witnesses at the birth and baptism, and these to be examined. Stair, 19th December 1666, Thomson *contra* Stevenson. --- Witnesses who were uncles and cousin-germans to both parties were admitted in the proving of the tenor of a latent writ, which fell only to have been seen by near relations. Gofford, 22d July 1668, M'Kenzie *contra* Bannantine. --- A brother-in-law and cousin-german were admitted *cum nota, ubi erat penuria testium*. Stair, 15th January 1679, Brown *contra* Town of Kirkcudbright.

THE Lords repelled a witness as being within the forbidden degrees of propinquity to the adducer, altho' the other party had before adduced him; for tho' when he was formerly adduced it was competent to put cross interrogatories to him, yet if that was omitted, it was now no more lawful for his relation to adduce him as a witness, than if he had never been adduced by the other party. Fountainhall, Forbes, 24th November 1709, Monteith *contra* Feuars of Abbotscarfe.

A CURATOR *ad negotia* can be neither judge nor witness in the minor's cause, altho' the minor have also curators *ad litem*. Maitland, 17th March 1555, Ld. Lethington *contra* Ld. Carstorphin. --- In a question, whether a tutor could be admitted witness to prove the passive titles against a party, when his own pupil had the like action on the passive titles; the Lords resolved it in the negative, except in *penuria testium*, and then only to be received *cum nota*. Fountainhall, 18th July 1678, *contra* Lord Rollo. --- A man who had got a woman with child, having thereafter at a communing with her friends, promised to pay a sum of money to one of them for her behoof, she being on the other hand to give him a declaration, That he was under no promise of marriage to her; the Lords found, That this was not a naked promise, but of the nature of a bargain, and therefore probable by witnesses. And it being objected against that friend to whom the money was promised for her behoof, That he being a party could not

be admitted, the Lords nevertheless admitted him as a competent habile witness, he being a communer, and so the fittest person to declare the terms. Fountainhall, Forbes, 26th June 1706, Anderson *contra* Gordon. — In a process for a verbal injury committed against a magistrate, pursued after he was out of office, his colleague, who fined the offender for that injury, being also exaundered, was admitted as a witness for the pursuer. Forbes, 18th November 1712, Tod *contra* Crookshank.

Witness under influence by fear or awe. And *imo*, hired servant.

A WITNESS having been refused to be received by the Lords, because he was the adducer's bollman, and consequently a removeable servant, and thereafter the adducer dismissing him from his service, and then again adducing him, and both the adducer and witness offering to depone, That there was neither design nor concert betwixt them; the Lords allowed him to be received. Fountainhall, 13th July 1703, Cochran *contra* Cuninghame. — It being objected against a witness, That he was a domestick to the adducer the time of the citation, at least was turned away a little before on purpose to habilitate him; and the answer being, That he was out of the adducer's service five months before the citation, and before there was any view of this probation; the Lords judged the objection relevant, and likewise the answer to take it off: But these objections not admitting terms for proving them except by the witness's own oath, therefore they ordained him to be first interrogated and purged touching the time of his going out of the service, and the occasion thereof, and whether it was in prospect of his being a witness. Fountainhall, 5th February 1709, Lady Cardross *contra* Hamilton. *Nota*, Forbes, who dates this decision, 4th February, narrates the case as if the servant had been turned off after citation. — Altho' a servant cannot be witness for his master, yet the master may be witness in any cause for his servant, altho' he be yet in his service. Balfour, (*Witness*) 5th May 1542, Ld. Pitbladdo *contra* Spence.

2do, Servant hired by the day.

THIS objection against witnesses repelled, *viz.* That they served the adducer on days wages as masons. Fountainhall, 26th February 1685, Erskine *contra* Robertson.

3tio, Servants to relations.

IN a complaint by an advocate against his servant, That he had stoln from him papers which belonged to a process, and given them up to the contrary party and his doers, also against the said contrary party and his doers for debauching his servant; the Lords having allowed both parties to adduce what probation they could for clearing the matter of fact alledged *hinc inde*, and the advocate offering to adduce his father's and brother's servants, (his father being a party in the principal cause) to prove that they heard the boy say, his master had been unkind to him, and threatening that he should be even with him if he could; the Lords found these witnesses not receivable. Fountainhall, 16th January 1712, Ld. of Kilmahew *contra* Houston.

4to, Officer of court for the baron.

AN officer of a regality court, tho' he had neither fee nor pension from the Lord, was refused to be admitted a witness for him. Gofford, 19th January 1670, Lord Balmerino *contra* Lady Coupar. — In a question, if the officer of a regality could be received a witness for the bailie, the Lords found he might, if he depended upon the Lord of the regality for his being turned out, and not on the bailie. Fountainhall, 29th November 1678, Bailie of Falkirk supplicant.

A TENANT

A TENANT without tack was repelled as a witness, altho' he dwelt only on the adducer's mother's conjunct-fee-lands, to which the said adducer was to succeed after her decease. Maitland, Balfour, (*Witness*)^{5to, Moveable tenants in prædio rusti.} 11th June 1563, *Ld. Lochleven contra Ld. Arnot*. — The Lords rejected a witness as being the adducer's tenant, unless it were alledged that he had a liferent-tack; and this altho' he had a tack for 17 years, and so not removeable till that time elapsed. Nicolson, (*Witness*)^{6to, In prædio urbano.} Durie, 29th July 1625, *Scot contra Ld. Barns*. — A tenant bruiking *per tacitam relocationem*, tho' he be an heretor of other lands, yet cannot be a witness for his master. Gosford, 19th January 1670, *Lord Balmerino contra Lady Coupar*. — One possessing an acre of grafs without a tack, was admitted as a witness for his master, being a merchant of a considerable stock. Marcus, (*Probation*) February 1682, *Lady Crumstein contra Sir James Cockburn*. — A witness being tenant to the party when he compeared, was declined, tho' he was not his tenant when first cited. Durie, 15th March 1632, *contra*. — A witness was rejected because he was a moveable tenant, wanting a tack at the citation, tho' he got one afterwards, because it might be given him on purpose to capacitate him. Fountainhall, 16th July 1680, *Rome contra M'Brair*. — A moveable tenant admitted to prove his master's possession, in order to infer prescription. Marcus, (*Probation*) 8th November 1687, *Pourie Fotheringham contra Lord Panmure*. — A moveable tenant led by his master was received as a witness. In this case it was a proof of an old fact, where there behoved to be *penuria testium*; but, generally speaking, in the present practice of the court this objection goes for very little. 15th January 1735, *Blackadder contra Colonel Erskine*.

As removeable tenants within burghs royal may be witnesses for their landlords, so it was found, That in this case Leith was to be respected as a royal burgh. Durie, Haddington, 11th June 1623, *Watson contra Grinlaw*.

SONS or subtenants to moveable tenants may be witnesses for the master of these tenants. Durie, 11th December 1632, *Earl Haddington contra Ld. Lamington*. — It being alledged against a witness, that he could not be received, as being subtenant to a moveable tenant without tack, and so under the same influence, terror and aw, since, if the tenant be removed, all his cottars must go out with him; yet the Lords repelled the objection, and sustained the witness. Fountainhall, 5th February 1709, *Lady Cardrofs contra Hamilton*. Bruce, 30th November 1716, *Moncrief contra Town of Perth*.

THE Lords admitted an artificer's servants, *cum nota*, as witnesses for their master to prove the sufficiency of a piece of work sold by him, and wrought by them, being necessary witnesses. Forbes, 11th July 1705, *Lord Inverury contra Gordon*. — The Lords sustained menial servants to prove the terms of a bargain of salt to the master's behoof, being also necessary witnesses. Forbes, 31st December 1708, *Smith contra Matthie*.

ALTHO' a person reside within a baron's bailiary, yet the Lords found that he may be adduced by him as a witness. Sinclair, 15th March 1540, *Lord Somervell contra*. — A person may be witness for another, to whom he had found lawburrows preceeding his citation to be witness. Balfour, (*Witness*) 20th March 1544, *Adamson contra Johnston*. — Divers persons being pursued, and the pursu-

er passing from some of them, and insisting against the rest; the Lords found, That the persons passed from could not be witnesses for him in that cause. Balfour, (*Witness*) 3d March 1566, *Ld. Drylaw contra Indwellers in Dalkeith*. ---- In like manner it was found, That if a person's name be insert in the principal summons as a party, and yet he be not summoned, he cannot be a witness in that cause. Balfour, (*Witness*) 7th March 1575, King's Advocate *contra* Priores of Coldstream. ---- A person called as a party in a process, being passed from *simpli-citer* by the pursuer, was allowed to be examined as a witness *cum nota*. Forbes, 9th July 1712, Hay *contra* Forbes. ---- It being objected against a witness, That the adducer had got bond for a sum of money from the witness, whom he had under diligence for it, which impressi-on might bias him to be partial; the Lords repelled this objection. Fountainhall, 7th February 1711, Campbell *contra* Farquhar. ---- In a process for a verbal injury committed against a magistrate pursued after he was out of office, the common town officers were received witnesses for him. Forbes, 18th November 1712, Tod *contra* Cruik-shank. ---- In a process about a piece of controverted ground between a burgh and a neighbouring heretor, it being objected against the town's witnesses, That the magistrates were in use to pay the half of the stent on houses and trade, which, if they pleased, they might wholly exact from the witnesses, so that they were under the magistrates influence; the Lords repelled the objection. Bruce's MS. 30th November 1716, Moncrief *contra* Town of Perth. ---- In a similar case found, That the town-clerk's deputy was no more receivable to bear witness for the town than a moveable tenant for his master. Fountain-hall, 17th January 1679, Lord Hatton *contra* Burgh of Dundee.

Interest in
the cause.
And *imo*,
Where it is di-
rect.

IN a process at the instance of an executor-creditor against a debtor of the defunct's, it was alledged for the defender, That, by the de-funct's order, he had made payment of the sum to taylors, baxters, &c. to whom the defunct was owing; this order was not found probable by their oaths to whom the payments were made, seeing they had an interest in the cause. Durie, 2d February 1642, Murray *contra* Merchiston. — The Lords admitted *cum nota* an instrumentary witness to depone for improving a party's subscription, altho' he was to have been a gainer by annulling the writ. Forbes, 23d November 1708, Sim *contra* Donaldson. — In a declarator of recognition, there being a joint probation, the defender, the heretor, adduced a witness, against whom it was objected, That he was creditor to the defender, who had nothing to pay his debt if the lands fell under recognition, and conse-quently the witness would tyne or win. The Lords repelled the ob-jection against the witness, his interest being but consequential. Har-cus, (*Probation*) January 1682, Hay of Murie *contra* Phinhaven. — It being objected against witnesses adduced in a process for proving the passive titles against the defender, That they were creditors to his father, and so might tyne or win by the probation, in so far as the proving of the passive titles would make the defender represent his fa-ther, which would secure the debts due to the witnesses. Answered, The witnesses are secured by wadsets from the defender's father, and they are the defender's own people, *viz.* his bailie, his grieve, and his clerk, who will not readily depone against the master any thing that is not true; besides, intromission with heirship is of difficult probation.
The

The Lords repelled the objection. *Harcus, (Probation)* February 1682, *Flockheart contra L. Rollo*. — In a process of sale some of the creditors being adduced as witnesses to prove the rental, the Lords refused to admit them, tho' they were necessary, there being *penuria testium*; and tho' they were not adduced to prove the value, in which they might be more suspected, but only the rental. *Fountainhall*, 23d December 1692, *Brisbane contra Bruce of Kennet*. — A bill of exchange being suspended, and improbation proponed against it; the Lords found the cautioner in the suspension was not a habile witness for the suspender, as being interested in the cause, tho' the suspender was *omni exceptione major*. Upon this the suspender offering to consign the money, it was answered, That this would be a good deed or gratification to the witness. Replied, Tho' a paction to this effect, privately entred into, might look suspicious, there can ly no objection where the cautioner is relieved *palam & authore pratore*. The Lords found the witness might be simply received, as to the producing of writs, that *comparatione literarum* might serve in the improbation; but as to his giving his judgment and opinion upon the hand-writ and subscription, that he ought only to be admitted *cum nota*. *Fountainhall*, 17th December 1701, *Alison contra Gordon*.

IN a reduction of a disposition, as done on death-bed to the prejudice of the heir, one of the witnesses adduced by the defender, to prove that the defunct came to kirk and mercat, being objected against, That his mother had a legacy or debt left her by the defunct, and so he was concerned to depone for supporting the disposition; because, tho' the legacy was payable out of the moveables, yet they being *aliunde* exhausted, she must get payment out of the lands. The Lords first declared, That they would only admit him *cum nota*: But thereafter they *simpliciter* rejected him. *Fountainhall*, 8th December 1686, *Smiths contra Lady Ninewells*.

NOT only kinsmen to the magistrate of a burgh-royal, but even indwellers in the town were repelled as witnesses in an action pursued by the magistrates. The like in case of the burgeses of a neighbouring burgh, who often pastured their cattle upon the said burgh's commonty. *Sinclair*, 13th February 1541, *Town of Selkirk contra Tenants of Kelso*. — But the contrary was found thereafter, and the indwellers in a town admitted witnesses in the town's cause; because it was presumed that they had no immediate and particular interest nor profit by the cause. *Colvil*, 11th January 1576, *Hospital of Leith contra Town of Kinghorn*. — The like, tho' the question was about the town's common good. *Balfour, (Witness)* *Town of Leith contra Town of Kinghorn*. — The town of Inverness having adduced witnesses to prove the quantity of the multures of their mill, it was found, That those who were present bailies or town officers, could not be witnesses in this cause, which concerned the common good; but that others, altho' members of the incorporation, might be witnesses, tho' they had been formerly magistrates or officers; and a witness was also admitted who was a present member of the council *cum nota*. *Stair*, 13th June 1672, *Town of Inverness contra Forbes*. — Burgeses in re *communitatis* are habile witnesses, and cannot be repelled. *Fountainhall*, 14th June 1709, *M'Kenzie contra Town of Inverness*. — In a process about a piece of contraverted ground, between a burgh and a neighbouring heretor, it being objected against the town's witnesses, That they were burgeses of the burgh, and might lose or gain by the cause, they

2do, Interest of friends.

3tio, Inhabitants in questions of common good.

being intitled for a small gratuity to pasture on the contraverted ground, and to bleach there *gratis*. The Lords repelled the objection. Bruce's MS. 30th November 1716, Moncrief *contra* Town of Perth.

4to, Inhabitants in questions about the town's jurisdiction.

FOUND, That the inhabitants of a burgh could not be witnesses for the town *in materia privilegii*, whether they had an exclusive criminal jurisdiction, because that was *in re communi, quæ tangit singulos*, seeing each burger may be criminally pursued, whereas their common good relates to them only as a body corporate; but found honorary burgeses receiveable. Fountainhall, 17th January 1679, Lord Hatton *contra* Burgh of Dundee.

5to, If the witness renounce his interest?

IN the proof of a tenor, a witness being led, who had a wadset which depended upon the existence of that deed, and so might tyne or win by the cause; and it being answered, That the wadset-sum was otherwise well secured by cautioners; the Lords did find, That unless he would renounce his right of wadset, and take him to his security by cautioners, he could not be received a witness. Gosford, 8th February 1677, Stewart *contra* Montgomery. ---- Two witnesses being adduced for proving the condition a party was in when he signed a paper on death-bed; and it being objected against one of them, that he was a remote substitute in a tailzie, which this death-bed-deed had broken and altered, and so might gain or lose by the cause; the Lords refused to receive him as a witness, altho' he offered to renounce under his hand all pretensions to the succession, which offer made rather a stronger objection, as inferring a shrewd presumption either of partiality or of collusion. Forbes, 14th, Fountainhall, 17th June 1707, Livingston *contra* Menzies.

Ultroneous witness.

IT being offered to be proved against a witness, that on a letter or message sent him by the other party, he came to Edinburgh to receive a citation, tho' he did not appear before a judge to make faith, or to depone, till he was lawfully cited to bear witness in the cause; the witness was rejected. Fountainhall, 27th June 1701, Hope *contra* Gordon. ---- The Lords rejected witnesses as ultroneous, because they received only verbal citations, but no written copies. Fountainhall, 14th June 1709, M'Kenzie *contra* Town of Inverness.

Proditio testimonii, and giving partial counsel.

IT was found not to be partial counsel in a witness, to declare to one of the parties the verity of what he knew in the cause, unless he did it unrequired, and informed and perswaded the party to intent the action. Haddington, 11th January 1611, Dalgleish *contra* Gaw. ---- It being objected against a witness, That he had told what he was to depone, which was a *proditio testimonii*; it was found, That witnesses may be asked what they know of the matter, provided no paction be made with them to abide at that information. Gosford, 9th November 1669, Lady Towie *contra* Barclay. Fountainhall, 13th February 1679, *contra* . ---- It was sustained as an objection against a witness, That in return to a letter of the pursuer's, he had acknowledged by a letter the fact libelled, which was in some sort *prodere testimonium*; but he was ordained to be examined *cum nota*. Stair, 16th June 1681, Elies *contra* Duke of Hamilton. ---- It being objected against a witness, That he had given partial counsel, at least had concerned himself as a party for the adducer, having been at consultations with him in relation to the process; it was found, That he could not be a witness, tho' he was a person of integrity above exception, and that he was

was free to declare, that, at the said consultations, the point whereupon he was to be used as a witness, was not under consideration. Dirleton, 24th January 1677, Ld. Drummelzier *contra* Earl of Tweddale. ---- It being objected against a witness, that he not only was frequently entertained in the adducer's house, but was present at consultations in the cause, tho' that was before, not after the Lords by an act had fixed the points to be proved; yet their Lordships thought this an affected abstinence, and therefore rejected him from being a witness. Fountainhall, 5th July 1699, Home *contra* Home.

A MAN under caution to underly the law for theft, not convicted, may be a witness. Haddington, 5th June 1623, Master of Jedburgh *contra* Elliot. ---- It being objected against a witness, That he was infamous, *infamia facti*, as having confessed adultery before the Kirk-session, and satisfied for the same; the Lords considered, That what was done *in foro pœnetentia* for exonerating of one's conscience and purging the scandal, was no ground to deprive him of his civil privileges as a witness or otherwise, else that would scar men to confess, and harden them in their sins; and therefore repelled the objection, unless he had been convicted in a civil court. Fountainhall, 22d February 1709, Taylor *contra* Lord Lindoris. -- It being objected against a witness, That he had held out a garison against the government, for which he had been put under sentence of death, and tho' the punishment was remitted by a pardon, the infamy still remained, so that he could not be a habile witness; yet the Lords considering the articles of capitulation for surrendering of that fortress, and thereby finding, that the pardon was not absolutely gratuitously, but for an onerous cause, and so fully remitting the crime, they found him a habile witness. Forbes, 7th, Fountainhall, 12th July 1709, Forbes *contra* Monro. ---- In clandestine crimes, such as adultery, infamy is not a relevant objection against a witness, unless it be *infamia juris*, by doing a deed which the law declares to infer infamy, or where the witness is declared infamous *sententia judicis*. Stair, 31st January 1671, Ld. Millton *contra* Lady Millton.

It being objected against a witness, who was schoolmaster of the place, That, after he was cited, he had said in a company, There were arrears of his fees resting to him, and he would swear best to them that paid him best; the Lords sustained the objection as relevant to reject him. Fountainhall, 17th June 1707, Livingston *contra* Menzies.

THE Lords admitted witnesses, altho' the adducer had kept them 15 days in his house before they came up, and then paid them before-hand their due charges. Colvil, August 1587, Chalmers *contra* Monro. ---- The attempt of corrupting a witness, by giving, or promising a good deed, more than suitable to the witness for his charges, is a relevant objection. Stair, 31st January 1671, Ld. Millton *contra* Lady Millton. --- Objection being made against witnesses, That they had received good deeds from the adducer, in so far as he hired a boat for them in the north, to bring them about to Leith, and put in a considerable quantity of provisions to serve them by the way; and being, by storm, put in at a port, he assisted them, and caused his stabler at Edinburgh give them lodging; the Lords thought there was

no evidence of corruption here, yet judging it a bad preparative to engage the affections of poor people in time of dearth, they remitted to the ordinary to enquire into the kind and quantity of the provisions, and if they were not beyond the legal allowance, to receive the witnesses. Fountainhall, 13th June 1699, Forbes of Foveran *contra* Ld. Udney. ---- Two of the defender's tenants being adduced for the pursuer, and in the preliminary of their depositions acknowledging, That an unknown person met them in the way, and gave each of them half a dollar, saying, He wished well to the pursuer, and hoped they would do the like; the Lords suspected that this might be an artifice of the defender to disqualify the witnesses, there being a *penuria testium*, and appointed an enquiry, but no discovery being made, they received the witnesses *cum nota*, because of their taking money, and sent them both to prison. Fountainhall, 24th June 1701, Erskine *contra* Erskine.

If a witness
is prompted
how to de-
pone?

It is a relevant objection against a witness, That he was instructed or prompted how to depone, without necessity to alledge that the witness undertook to depone accordingly; which is introduced *in odium corruptentis*, inferring no blemish upon the witness so prompted who consented not, nor swore falsely. Stair, 31st January 1671, Ld. Millton *contra* Lady Millton. — The like, where the adducer had called the witness to his chamber, and shewed him an unsubscribed rental of the lands whereof the rent was to be proved. Marcus, (*Probation*) February 1682, Lady Crumstane *contra* Sir James Cockburn.

King's unlaw.

A WITNESS was rejected because he had begged a few days before, altho' it was alledged that he had free gear worth the King's unlaw. Nicolson, (*Witness*) June 1623, Master of Jedburgh *contra* Eliot. — A person was received as a witness, altho' he had taken the benefit of *cessio bonorum*. Nicolson, (*Witness*) 10th January 1628, Dundas *contra* Symington. — Found, That a witness being under a fee or having a trade, may be sustained, altho' he have no effects. Forbes, 24th November 1709, *contra* — In clandestine crimes, such as adultery, it is not a relevant objection against a witness, that he is not worth the King's unlaw. Stair, 31st January 1671, Ld. Millton *contra* Lady Millton.

Socii criminis.

In a spuilzie it being alledged, That the pursuer had called all that were present upon the ground as accessories, to deprive the defender of proving his defence by witnesses; the Lords ordained the pursuer to declare whether he would insist against the others as accessories; and if he did insist, ordained the process against the principal party to sist till the accessories were discussed, that such of them as were affoizied might be used as witnesses. Stair, 24th February 1662, Irvine *contra* M'Cartney.

SOCII criminis not found a relevant objection in *materia falsi*, because if this were a relevant objection, the direct manner of imputation could never be followed out. Gosford, 9th November 1669, Lady Towie *contra* Barclay. — Whether a *socius criminis* can be admitted as a witness to prove forgery against another, debated, but not determined. Fountainhall, 17th December 1696, Stewart of Tillcultry *contra* Sir Patrick Nisbet.

IN

IN pyracies and oppressions at sea, the Lords found, That the sufferers of the violence may be witnesses, if they be not pursuers, because it would be impossible to prove it by others. Haddington, 14th February 1606, *Ld. Cultmalindie contra* Earl of Orkney. Colvil, January 1582, *Stranger Flemings contra* Burgesles of Edinburgh.

In crimes the parties injured, if not pursuers.

THE testimony of women in civil causes was repelled. Maitland, 5th March 1550, *contra*. — The same was again done in case of probation of a person's age. Maitland, 6th July 1558, *Lady Coluthie contra* Carnegie. — Women witnesses not admitted to prove the loan of a bed. Stair, 21st July 1675, *Wilkie contra* Morison. — Nor even the set of a tenement within burgh, tho' commonly employed to make the bargain. Dalrymple, 13th December 1715, *Waugh contra* Smith. — In the reduction of a disposition granted by a wife to her husband *stante matrimonio*, the Lords refused to allow women, who, as creditors to the wife, had received payment of their debt, to depone thereanent for proving the onerous cause of the disposition. Forbes, 18th June 1706, *Birrel contra* Fergus. — In a question about marches, the Lords refused to admit a woman witness. February 1730, *Dunbar contra* Murdoch. — In a reduction of a disposition upon the head of death-bed, women witnesses were not sustained to prove an alledgeance, That the granter was crazy in his judgment, there being no *penuria testium*. 13th January 1736, *Wiseman contra* Lockhart Wiseman.

Women not receivable in ordinary cases.

WOMEN *omni exceptione majores*, were found habile witnesses in the crime of adultery, in respect of the occultness thereof. Falconer, 1st, Home, Fountainhall, 1st and 2d January 1684, *Countess of Monteith contra* Earl of Monteith. — The Lords found it relevant to reduce a discharge subscribed by a woman, that it was offered to be proved to have been presented to her in her child-birth pains, which their Lordships judged an unseasonable time, and that she was then *quasi in lecto*, & *vix satis mentis compos*, and allowed it to be proved by women witnesses, others not being allowed to be present *in puerperio*. Fountainhall, 7th December 1686, *contra*. — In a process of aliment at the instance of a wife against her husband, she having separated on alledged maltreatment, women were found habile witnesses in such cases. Fountainhall, 15th June 1698, *Duchess of Gordon contra* the Duke. — It being alledged in a process, That a man had *dolose* concealed that his wife had a cancer in her breast at the time he sold her jointure, whereof she died within nine or ten months, and the Lords having allowed a probation of the fact before answer, and one of the witnesses adduced being a woman, their Lordships admitted her simply without exception. Fountainhall, 23d November 1698, *Fletcher contra* Kennedy. — In mutual processes for the right of some lands, betwixt a creditor and the apparent heir of the debtor, the latter alledged, That the former had violently thrust him and his wife out of the house, and then intromitted with the charter-chest, and so might abstract and destroy discharges that might have extinguished his claims; and this being admitted before answer, and he adducing divers women witnesses, the Lords, in regard it was *in re domestica*, and under night, and to prove acts of violence, allowed the

Receivable ubi est penuria.

women witnesses to be received. Fountainhall, 17th December 1709, Neilson *contra* Kennedy. --- Women witnesses admitted to prove furnishing out of a shop kept by a woman; and in which there were no male apprentices. Dalrymple, 13th December 1715, Muirhead *contra* Reid. --- The Lords, *in re antiqua, & ubi erat penuria testium*, allowed women witnesses to be received to prove a propinquity in order to a service. July 1728, Marjoribanks *contra* Trotter.

Women witnesses in marriage.

IN a process of adherence, the commissaries having refused to allow women witnesses for proving the actual celebration of the marriage; but declared they would admit them to prove cohabitation, and being reputed man and wife, and the man's owning and acknowledging her to be such, and the child to be his lawful begotten child, and any other matrimonial deeds subsequent to the marriage; the Lords, at advising a bill of advocacy, found, That the commissaries had not committed iniquity, and therefore remitted the cause. Fountainhall, 5th January 1705, Chalmers *contra* Brown. --- The Lords found women not habile witnesses to prove that persons were married, or held and reputed so. Forbes, 9th February 1709, Forbes *contra* Forbes. --- A woman having raised a declarator of her marriage with a certain person then defunct, in order to have the benefit of the legal provisions, the Lords refused to sustain the naked testimony of two women witnesses offered for the pursuer to prove the solemnization of the marriage, unless further adminicles could be condescended upon. June 1730, Murray *contra* Smith.

Inimicitia capitales.

A WITNESS was repelled, because a near friend of the defender had slain the said witness's nephew upon presumed deadly feud, altho' the witness in the preliminaries of his oath had deponed that he bore him none, because he was not accessory to the slaughter. Colvil, May 1589, Atchison *contra* Sinclair. --- The Lords repelled a witness, because there was deadly feud betwixt the said witness and a cousin-german of the party against whom he was adduced, altho' it was not alledged that the said party was art and part in the feud. Hope, (Witness) 12th November 1616, Muirhead *contra* Cleland. --- A witness was repelled, because the party against whom he was adduced had wounded the witness's brother, and left him for dead in his presence, altho' the witness offered to purge, &c. Haddington, Nicolson, (Witness) June 1623, Master of Jedburgh *contra* Eliot. --- Found, That persons may be witnesses in a cause against a party, altho' they had charged her upon a lawburrows, and had given their oaths that they dreaded her bodily harm, unless the lawburrows had proceeded upon blood and deadly feud. Hope, (Witness) June 1610, Lady Halton *contra* Hepburn. --- The Lords received one of two persons under mutual lawburrows a witness against the other, the former purging himself by oath of any malice towards the latter. Forbes, 16th November 1711, Armstrong *contra* Sharp.

Wife not bound to bear witness against her husband, nor son against his father.

IN a declarator of astriction, the pursuer being allowed to prove the quantity of the multures, and citing the defender's wife as witness, because she was *præposita*, and knew the quantities best, the Lords inclined to think that she could not be adduced a witness if her husband reclaimed. Fountainhall, 23d July 1700, Erskine *contra* Smith. ---

A young

A young lady pursuing her stepfather for an aliment, upon account of his severity in beating her, &c. and she having cited his son to witness against his father, being *in crimine privato & domestico*, which could not be otherwise proved, yet the Lords declined to receive him, because parents and children, and such near relations are not so much rejected *a testimonio*, as excused from bearing witness *ob reverentiam personarum, & metum perjurii*. Fountainhall, 23d July 1700, Drummond *contra* Alexander.

IT being objected against a Jew, who was adduced as witness in a cause, That Jews bear a rooted hatred against all Christians; the Lords thought, That if a Jew were led a witness in a cause betwixt a Christian and a Jew, there might be reason in that case to suspect him, but it being betwixt two Christians, his disowning JESUS CHRIST for the Messias did no more incapacitate him than it would do a Socinian, our *formula jurandi* mentioning only GOD in the general; and tho' a Jew will not swear on the New Testament, yet he will swear by JEHOVAH on the law of Moses: Nay, which is more, a Turk or a Pagan is capable, for in Captain Green's Case of piracy, two heathen boys were admitted; and if in criminals, why not in civil cases? It was also remembered that the Queen had knighted Sir Solomon de Medina, a Jew, and if capable of honours, why not of bearing testimony? And we allow Quakers to declare in their own way: The Lords therefore admitted him *sine nota*. Forbes, 17th, Fountainhall, 19th January 1712, Menzies *contra* Morison.

Jews and Pagans admitted as witnesses.

IN proving a person's age, the Lords, *ex officio*, received witnesses who were *affines & consanguinei*. Colvil, June 1581, Wallace *contra*. — Witnesses, against whom legal objections ly are yet sometimes examined *ex officio, ad informandum animum judicis*; but in such a case the Lords declared, That, in advising the proof, they would have consideration of the objections. Durie, 21st December 1630, Lord Johnston *contra* Earl Annandale. — A bond granted by a minor, bearing borrowed money, being assigned without warrandice; in a reduction of the same upon minority and lesion, the assigney offered to prove the onerous cause by witnesses, *sciz.* his cedent the original creditor and his servant; the Lords, before answer, examined these witnesses *ex officio*. Durie, 28th July 1637, Lord Dunnipace *contra* Littles. — In a reduction of a testament, the testamentary witnesses being appointed to be examined, and it being objected against one of them, That he was a legatary, and so could not be admitted; the Lords decided that he could not be adduced, but declared, That, if they saw necessity *ad informandum judicis animum*, they would examine him. Fountainhall, 17th November 1699, Wilton *contra* Kelburn.

Inhabile witnesses admitted *ex officio*.

DEPOSITIONS being taken in the country by commission, the Lords sustained the same, tho' they did not bear that the witnesses were examined by these formal words, "As they shall answer to GOD," the challenge being laid at a great distance of time, and the mean of probation being now probably perished. Fountainhall, 9th December 1684, Falconer *contra* Kinnier. — The Lords refused to sustain depositions of witnesses as probative, because the said depositions bore only in the nar-

Form of depositions.

rative, that the witnesses were deeply sworn, but not that what they deposed " was truth, as they should answer to God. " Fountainhall, 9th December 1685, Craigie *contra* Moodie.

Re-examination.

A WITNESS after he had been examined, giving in a bill to the Lords, pretending that some things had escaped him, which now burdened his conscience, and therefore craving to be re-examined; the Lords refused the desire of the bill, in regard that, by his oath, there was a *jus quæsitum* to the party, which the witness could not retract, and such re-examinations must only be at the desire of the adducer, and not of the witness himself. Fountainhall, 16th July 1701, Irvine suppliant. ---- The Lords refused to re-examine a witness on special interrogatories, he having already deposed *negative* to the general. Fountainhall, 16th January 1712, Ld. of Kilmaronock *contra* Houston.

Witness entitled to his expences.

THE Lords refused to allow expences to a witness comparing to depone, after extracting of a second diligence against him; but they allowed the expences of his journey before, and granted caption against the adducer's agent, till payment thereof were made. Forbes, 19th June 1707, Feuars of Fraserburgh *contra* Lord Salton. --- A witness deposing, That he used to ride, when he travelled, and that he came on horseback to depone in the cause, was allowed the expences of his horse. Forbes, 11th June 1713, Chalmers *contra* Grant.

DEPOSITIONS how to be subscribed. See Writ.

INSTRUMENTARY witnesses. See Writ.

W R E C K.

A DECRET being obtained before the admiral against a person, as holden *pro confesso* upon his intromission with some wreck-goods, which decret, among other things, decerned him to pay the price of an ox, which escaped, and was intromitted with by him; the Lords, in a suspension, reduced the decret, and suspended the letters *simpliciter*; because the sentence itself confessed, that there was one living creature which escaped, so that the ship could not be esteemed a wreck. Durie, Haddington, 12th December 1622, Hamilton *contra* Cochran. --- The statute is our rule, bearing, That stranger ships broken upon our coast, should have restitution of their goods, where they observe the like upon their coasts. Stair, 20th January 1674, Jacobson *contra* Earl of Crawford.

A SHIP being wreck, and the admiral disponing to one who seizes upon the vessel, and brings ashore some of the loading, and secures the rest of the bulk with the ship itself; the Lords found him secure by possession, as if it were of all, and the next succeeding was found to have no right. Gosford, Stair, 27th July 1677, Duke of Albany *contra* Earl of Argyle.

W R I T.

W R I T.

Subscription of the Party

A BILL subscribed with initials, by an ignorant country woman, who could not read, nor ever had been in use to write, blank scores being drawn by another hand, which she was made fill up with a pen, was found null; it being pleaded, That this could not be called the person's ordinary subscription, which is what makes a writ effectual, nay, that it could not be called a subscription at all, not being a writing in any proper sense. February 1735, *Pringle contra Keill*. — It was found relevant to sustain a bond subscribed by initials, that the granter was in use so to subscribe. *Spotiswood, (Contracts) Auchinleck, (Subscription) 9th January 1628, Peiry contra Ramsay*. — A disposition was sustained, tho' subscribed by initials only, before two witnesses, the disponent always proving, That this was the disponent's usual manner of subscribing, not only by witnesses, but also by other writs so subscribed. *Fountainhall, 20th January 1693, Ker contra Gibson*. — The Lords sustained a bond signed before witnesses by initials, being done in Ireland; nor was it put upon the pursuer to prove, That the granter was in use so to subscribe. *Durie, 20th January 1631, Houston contra Houston*. — A single writ of the same form with that quarrelled, was sustained as an evidence that the party was in use to subscribe by initials. February 1723, *Earl Traquair contra Gibson*.

SUBSCRIPTION by initials is good in law, where it is the party's ordinary form of subscribing; but in denying that it is the party's handwriting, the objector is not put to the necessity of improbation, but may do it by way of exception, in which case the user of the writ must prove the subscription by the instrumentary witnesses. *Durie, 14th February 1633, Grierfon contra Grierfon*. *Haddington, 17th January 1611, Carnaway contra Ewing*. — A party pursued upon his bond, signed by the two initials of his name, as also by a notary and three witnesses, denying the subscription to be his; it was proved by the instrumentary witnesses, That it was his custom so to subscribe, but as to the actual subscription two were affirmative and two negative, refusing that they themselves subscribed, or saw the party subscribe; the pursuer's oath, taken *ex officio*, affirmed the truth of the subscriptions. The Lords found the bond sufficiently proved, the pursuer being a man above suspicion, and no improbation proponed. *Stair, 16th November 1667, Ld. Culterallers contra Chapman*. — An assignation of a bond of 2000 merks, signed only by initials, being quarrelled in a reduction by the alledged granters as false; the Lords found it necessary to be proved, not only that the party had been in use formerly so to subscribe, but also that he did actually subscribe the writ quarrelled, the first *pro ut de jure*, the other by the instrumentary witnesses only; it being of dangerous consequence to carry considerable rights by such subscriptions, which may be easily counterfeited, and can hardly be redargued *comparatione literarum*; therefore they would sustain no extrinsic witnesses, tho' it was reported there was only one of the instrumentary witnesses alive, the assignation being of an old date, and nothing having followed thereupon. *Stair, 21st June 1681, Coutts contra Straiton*. — A bond of

500 merks subscribed by initials before witnesses, was found not to be probative *per se*, unless it were proved by the witnesses insert, That the debtor did actually subscribe, or they being dead it was proved, That the debtor was in use to subscribe by initial letters. *Harcus, (Subscriptions)* November 1683, *Galloway contra Thomson*. — In a mutual contract where one of the parties had subscribed by initials, the Lords, at discussing a suspension at his instance, repelled the objection, and sustained the contract, unless the suspender would prove that he used to subscribe *ad longum*, reserving improbation as accords. *Fountainhall*, 30th December 1701, *Forrest contra Marshall*. — A bill was sustained, signed only by the initial letters of the acceptor's name, it being proved, That the defunct was in use to sign by initial letters, and that the subscription was like his ordinary subscription, and by the writer of the bill, that he saw him actually sign. July 1729, *Thomson contra Shiel*.

In the executions of legal diligence.

THIS nullity being objected to the execution of a summons, That the subscription of one of the witnesses was by initials only; the Lords annulled the execution, tho' the party offered to abide by the verity thereof; for tho' subscription by initials of parties contractors is sustained *ex necessitate*, where they cannot write otherwise, care ought to be taken in legal executions, to adhibite such witnesses as can fully and formally subscribe. *Fountainhall*, *Dalrymple*, *Forbes*, 18th June 1707, *Meek contra Duncan*. In a process of removing, the defenders proponed an exception to the execution of warning, That it was not duly signed, having only the initial letters of the officer's name; the court seemed all satisfied, that this was no just objection to the execution of a baron-officer, because persons are not always to be had to undertake that low office who can sign their name at length. 27th February 1739, *Irvine of Neworchard contra*.

Signing by a mark.

IN fortification of a bill, which had nothing but a mark at it, bearing to be Archibald Johnston his mark, it being alledged, That, this Johnston a merchant and drover, was accustomed so to subscribe; the Lords, before answer, ordained the oaths *ex officio* to be taken of the writer of the bill, and of the witnesses who saw Johnston write this mark, or receive the money for which the bill was granted. *Stair*, 26th February 1662, *Brown contra Johnston*. — A Bill subscribed by a mark, before two subscribing witnesses, was sustained, it being proved to be the debtor's custom so to subscribe. *Stair*, 1st February 1669, *Brown contra Johnston*.

Sidescribing.

A DISPOSITION being quarrelled for want of sidescribing, the objection was repelled in respect the last sheet, duly subscribed, contained all that was material in the disposition. *Forbes*, 23d November 1708, *Sim contra Donaldson*. — A bond written upon two sheets, was sustained against the cautioner, tho' it was sidescribed only by the principal. *Stair*, 14th January 1674, *Ogilvie contra Earl Findlater*. — In like manner, an assignation was sustained against both the cedents, tho' sidescribed but by one of them. *Forbes*, 8th June 1711, *Creditors of Paton competing*. — A writ found null because not sidescribed, it being granted after the 15th act parl. 1696, establishing the custom of sidescribing. *Bruce*, 18th December 1714, *M'Donald contra M'Donald*.
Deeds

Deeds signed by Notaries.

A BILL sustained accepted by notaries for the party. 28th June 1737, Dunwoodie *contra* Johnston. What deeds may be executed by notaries?

By act 80. parl. 1579, it is appointed, "That deeds of great importance be subscribed by the parties, if they can subscribe, otherwise by two famous notaries, before four famous witnesses." Upon this clause, an obligation for a sum above an L. 100 Scots, subscribed for the party by two notaries, before three witnesses only, was found null; and the Lords declared in general, That any thing exceeding that sum, without regard to the quality of the parties, was to be reputed a matter of great importance. Durie, Haddington, ult. January 1623, Fotheringham *contra* Watson. — An obligation for the precise sum of L. 100 Scots, was found to be a matter of great importance; and therefore null, being subscribed only by one notary before four witnesses. Durie, 13th November 1623, Marshall *contra* Marshall. — The contrary found, *sciz.* That an obligation for L. 100 Scots is not a writ of great importance, and therefore it was sustained, tho' signed but by one notary, before two witnesses. Durie, 22d March 1634, Ochiltree *contra* Miller. — A bond of L. 80 principal, and 40 merks penalty, signed for the party by one notary only, sustained as a matter not of great importance, seeing the penalty was not to be respected. Durie, 1st February 1628, Ld. Halkerton *contra* Kadie. — Bond granted by a man to his three children for L. 300, was reduced at the instance of a creditor, as being signed only by one notary, altho' it was pleaded to be the same as three several bonds for L. 100 a-piece; but the importance as to the interest of the debtor was found the same, whether granted to one or to several persons. Dirleton, 16th January 1668, Anderson *contra* Tarbat.

A SUBMISSION was found null, because only subscribed by one notary, it being about an heretable right. Hope, (*Arbitration*) 7th January 1617, *contra*. — A disposition to the liferent of a house, which was constituted by infeftment, was found not to be a matter of importance, the yearly rent being only three or four pounds Scots. Durie, 27th January 1630, Rofs *contra* Home. — A tack was found null as being subscribed only by one notary. July 1729, Wilson *contra* Wilson. — The same as to the renunciation of a tack. Durie, 23d February 1632, Ld. Jerviswood *contra* Ld. Livingston. — A backbond of the same date and witnesses with the principal assignation, was found null, because it had only two notaries, and two witnesses, being a matter of L. 1000. Hope, (*Obligation*) 3d June 1613, Abercrombie *contra* Winram. 2do, Other deeds and conveyances.

IN a reduction of an apprising deduced upon a bond of 5000 merks; objected against the bond, That it was signed by two notaries before three witnesses only. Answered, The bond is in implement of a contract of marriage, and consequently cannot be a deed of great importance, when nothing is contained in the bond but what the party was *ab ante* obliged for. The Lords did find, That if the sum of 5000 merks, contained in the bond, was stipulated in the contract of marriage, that it could not be reduced upon that nullity; but if it 3tio, Deeds in satisfaction and implement.

did exceed the provision in the contract, it was null by the act of parliament, and no better than other bonds so subscribed. Gosford, 13th December 1671, Jack *contra* Jacks. ---- For the same reason, a disposition of moveables by a tenant to his master, in security and payment of bygone tack-duties, about 4 or 500 merks was sustained, tho' signed but by one notary. Durie, 5th December 1635, Sutor *contra* Cramond.

Solemnities in the subscription of notaries. 1mo, The attestation must bear the command of the party.

A DEED subscribed by notaries was found null, because the attestation did not bear, that it was by command of the party. Stair, 26th July 1667, Philip *contra* Cheap. ---- A testament being quarrelled, because signed for the defunct by the minister, and yet did not bear to have been at the desire and by the mandate of the party, the Lords found the testament null. Fountainhall, 23d February 1688, Wilson *contra* Executors of Urquhart. ---- A marginal note adjoined to a bond found null, tho' subscribed by both notaries, because the writ did not bear, that they had a mandate from the party to sign the marginal note, and it might have been done by the notaries *ex intervallo*. Fountainhall, 6th December 1695, Elliots *contra* Riddle. It is sufficient that the first attestation bear *de mandato*, tho' the same Words be not again added by the co-notaries. Harcus, (*Subscription*) 17th January 1682, Dewar *contra* Beatson.

2do, If it must bear *calamum tangens*?

By act 5, parl. 1681, the witnesses ought "to hear the party give warrant to the notary to subscribe for him, and, in evidence thereof, touch the notary's pen;" yet no law requires that the notary's attestation do mention this solemnity, the same will be presumed until the contrary be proved. Fountainhall, Dalrymple, 13th January 1704, Dallas *contra* Paul. Forbes, 7th July 1710, Maver and Cowback *contra* Ruffel.

3to, Notaries must sign *unico contextu*.

A WRIT was found null, in respect it was not signed by the two notaries *unico contextu*, but upon different days, and so not present at the time, as is required by the act 80, parl. 1579. Durie, Spotiswood, (*Contract*) 20th March 1633, Cow *contra* Craig. ---- The like. Durie, 23d January 1624, M'Moran *contra* Black. ---- The act does also imply, That the four Witnesses must be present at the subscription of each of the notaries, and therefore a deed, tho' sign'd *unico contextu* by the notaries, was found null, in respect that one of the four witnesses adjoined to his subscription these words, *Witness to the conotary's subscription*. Forbes, 24th December 1709, Anderson *contra* Cock. ---- So that upon a double account a writ was found null signed by one notary and two witnesses at one time, and some time thereafter by another notary and other two witnesses. Forbes, 27th December 1711, White *contra* Knox.

4to, If they must subscribe their attestations?

IT was objected against a writ attested by notaries, that the notaries had not subscribed their attestations. Answered, The names of the notaries are at length in the attestations in their own hand writing, which is sufficient; the Lords repelled the objection. December 1731, Cullen *contra* Thomsons.

Notary's subscription for a party that can write.

THO' the act 1579 give authority to notaries to subscribe for a party in case only he cannot subscribe himself, yet a contract was not found null simply upon that head, that the party could write, unless he would also refuse that he gave authority to the notaries to subscribe for

for him; in which case the command given to the notaries behoved to be instructed. Haddington, 8th December 1608, Littlejohn *contra* Hepburn. Haddington, 19th January 1610, Craig *contra* Collison, Haddington, 3d March 1610, Campbell *contra* Lyell. Haddington, 14th March 1612, Ogilvie *contra* Heirs of Din. Durie, 31st January 1637, Veitch *contra* Horseburgh. ---- The attestation of notaries for a party as *non valens scribere pro ægritudine*, is not probative of itself, (the notaries having acknowledged that the party could write) but must be ascribed by witnesses. Falconer, 3d January 1683, Clark *contra* Ld. Balgounie.

A MINISTER can only supply the place of a notary to a testament within his own parish. Haddington, Hope, (*Testament*) ult. January 1606, Hepburn *contra* Ld. Waughton. ---- A contract of marriage subscribed for the wife by a minister as notary for her, being quarrelled as null upon the act 133, parl. 1584, discharging ministers to be notaries, except in testaments; the objection was repelled, in respect that the prohibition is not under the pain of nullity of the deed, but only of deprivation of the minister. Durie, 12th July 1631, Ld. Haddington *contra* Bartilmo.

Minister acting as a notary.

THE same notary cannot subscribe for both parties in a contract. Haddington, 27th June 1610, Craig *contra* Richardson.

The same notary cannot subscribe for both parties in a contract.

Writer of the Deed,

THE act 179, parl. 1593, requires, That the writer's name and designation be inserted in the body of the writ before inserting the witnesses; this act was found only to extend to obligations, contracts, and such like, not to *actus legitimi*, such as a *safine*. Durie, 26th June 1634, Lord Johnston *contra* Earl Queensberry. ---- By act 5. parl. 1681, it is enacted, "That all writs to be subscribed by any party hereafter, wherein the writer and witnesses are not designed, shall be null, and not suppleable by condescending upon the writer, or designation of the writer and witnesses." ---- A precept of warning being quarrelled upon this clause, in that the writer tho' named was not designed, the objection was sustained, the act being general, comprehending all private deeds executed by parties, and custom hath introduced no exception with regard to precepts of warning, as it has with regard to bills of exchange, receipts to tenants, and such like privileged writs, in which the writer need not be named, far less designed. Forbes, 23d January 1711, Rofs *contra* Rofs. ---- A decret-arbitral found null for want of the writer's name and designation. Forbes, 3d July 1711, Short *contra* Hopkin.

Must be named in the deed and designed.

NEITHER the act 1593, nor the act 5, parl. 1681, requires that the writer be named and designed in his own hand-writing, therefore a bond was sustained where the writer's designation was insert after the clause of registration by another hand, who filled up the date, place, and witnesses. Fountainhall, 21st February. Forbes, 9th June 1710, White *contra* Henderson. ---- The writer of a deed being also one of the instrumentary witnesses, and not being designed in the body of the

If he must be designed in the body of the deed?

writ, but adding to his subscription, as witness, the following words, *and writer hereof*, the Lords found this a sufficient designation upon the act 1681; and as for the act 1593, requiring the writer to be designed in the body of the deed, they found the act in desuetude. Dalrymple, 26th July 1716, *Dronnam contra Montgomery*.

If the filler
up of the date
and witnesses
must be de-
signed?

THE Lords refused to find a bond null for want of the designation of the filler up of the date and witnesses; and found, That the act 1681 extended only to the writer of the body of the bond. Fountainhall, 29th, Falconer, 30th November, Home, December 1683, *Watson contra Scot*. 19th June 1722, *Ld. of Edmondston contra Lady Wolmet*.

Printed bond.

THE Lords found a printed bond due to a trading company null, because the essentials of the bond, *viz.* the parties names, the principal sum, annualrents, penalty, &c. being blank, were filled up in writing, and the filler up neither named nor designed; but it being suggested, that the blanks were filled up with the debtor's own hand, they allowed this to be instructed, because in that case it would be valid as a holograph writ. Fountainhall, Dalrymple, Forbes, 25th January 1710, *Allardice contra Ld. of Ballogie*. ---- But a printed bond, where the filler up of the blanks was designed, was sustained. Forbes, 30th November, Fountainhall, 1st December 1711, *Creditors of Spot competing*.

Instrumentary Witnesses.

In our oldest
form witnesses
not requisite.

A BOND of servitude, dated 1398, was not found null for want of witnesses, being sealed and subscribed by the party, and it was not the common practice to adhibite witnesses in these days. Durie, 11th March 1630, *Town of Edinburgh contra Town of Leith*.

Witnesses
made requisite
by after pra-
ctice.

A TICKET from one brother to another, bearing, "That he should bear the half of the expence of repairing a certain house," found null, as wanting witnesses, and not being holograph. Stair, 5th December 1671, *Dickson contra Dickson*. — A bond, tho' before the act 1681, was found null, there being but one witness. Stair, 4th January 1668, *Dow contra Campbell*.

If requisite
to the subscrip-
tion of con-
senters?

A DEED granted by a minor with his curators consent, being challenged, for this reason, That there were no witnesses to the curators subscription; answered, Witnesses are not necessary to the subscription of consenters, but only of principal parties, who are to be bound by the deed. The Lords found the act 1681 was general, and therefore sustained the objection. 13th February 1728, *Earl Dalkeith contra John Henrybook*.

What deeds
formal with-
out witnesses?

A BOND was sustained, tho' having but one witness, the substantials being written by the debtor, and it being proved to be his hand-writing. Stair, 23d January 1675, *Vans contra Malloch*.

AN exception being proponed against a decreet-arbitral, That it wanted witnesses, the Lords found, That there being four judges sub-
scribing

scribing, they might be witnesses to each other, as in charters subscribed by a convent. Hope, (*Arbitration*) 22d June 1615, Moncur *contra* Waddel. — It being objected, That a submission, and a decret-arbitral following thereupon, wanted witnesses, the objection was repelled, because the submission was signed by the parties and four arbiters; and the blank on the back of the submission, in which the decret was filled up, was signed by the parties, and three of the arbiters, which was sufficient, being only for a sum of money, not exceeding *L.* 1000. Durie, 1st December 1632, Hunter *contra* Halliburton. — An obligation being challenged, as wanting witnesses, it was not regarded, That the same was signed by four co-obligants; for the Lords found, That they could not be witnesses to each others subscriptions. Durie, 14th February 1633, Rankin *contra* Williamson. — An obligation wanting witnesses was sustained, the parties, who were many, being presumed to have been witnesses to one another's subscriptions. 7th January 1732, Seabox of Queensferry *contra* Stewart.

A CREDITOR is not a habile witness to the subscription of a bond granted to himself; and therefore a bond was found null, wherein there was only two witnesses insert, of which the creditor was one. Durie, 21st November 1627, Robertson *contra* Abercrombie. — Nor a notary witness to his own subscription. Durie, 20th November 1627, Lackie *contra* Cuningham.

Who may
be instrument-
ary witnesses?

THE executor named in the testament, being made also one of the instrumentary witnesses, the testament was only found null *quoad* the nomination of him as executor, but sustained *quoad* the legatars. Hope, (*Testament*) 1st July 1613, nearest of kin of Lady Innerleith *contra* Bishop of Galloway. — In a reduction of a testament by the nearest of kin, the Lords repelled the objection, That one of the instrumentary witnesses was also a legatar, tho' he had plainly an interest to support the testament; and tho' the nearest of kin impugning a testament, is not in the case of a debtor impugning his own bond, who cannot object against the instrumentary witnesses, who must be adhibited with his consent. Marcus, (*Improbation*) March 1685, Graham *contra* Marquis of Montrose.

FOUND, That one of the judges arbiters cannot, at the same time, subscribe the decret himself as judge, and also subscribe it as notary for one of the parties. Colvil, April 1583, Ld. Gormock *contra* the Lady. — The Lords sustained a decret-arbitral, tho' the notary, who subscribed the submission for the parties, was one of the arbiters, because the matter was small, and the parties were poor, and dwelt in a remote place, where notaries were not easily to be had. Spotiswood, (*Arbitration*) Durie, 29th January 1629, Howison *contra* Gibson.

THE Lords sustained this objection to annul a contract, That one of the witnesses was a few days short of fourteen years of age, when he did adhibite his subscription; and this was found, tho' the contract was fairly executed, and there lay no other objection against it. 12th December 1738, Davidson *contra* Charteris.

IT being objected by one of the parties in a minute of sale, That the writ was null, because one of the two instrumentary witnesses was infamous, *infamia juris*; in so far as there was a decret of improbation of a bond obtained against him some years before, finding him accessory to the forgery, and ordaining it to be cancelled; the Lords repelled the

objection, and found it no nullity, the witness being chosen by mutual consent. Fountainhall, 1st February 1710, Baillie *contra* Lockhart.

THE Lords refused to repel a witness in an execution of poinding, altho' there was deadly feud betwixt the witness and the debtor. Colvil, February 1586, King's Advocate *contra* Bryson.

Witnesses
must know the
party, and see
him subscribe,
or own his
subscription.

A BOND being quarrelled in a process as false, because one of the witnesses deponed, That he did not know the party to whose subscription he signed as witness, being then a boy of 14 years, and called off the street to be a witness; the Lords were convinced, That the bond and debtor's subscription were true; yet, in respect of the act 1681, they found the bond not false but null. Fountainhall, November 1698, Campbell *contra* Robertson. --- A disposition being challenged upon this head, That the witnesses did not know the party, they deponed, " That they never saw the party, before or after the " time they were called to be witnesses, but that the neighbours in the " close informed them, That such a person lived there, and at sub- " scribing she declared herself to be the person before several by-stand- " ers. " Against this it was urged, That the design of the law was to prevent one personating another, which could not be guarded against in the present case, where the witnesses, tho' they might know there was such a woman, could not distinguish her from any other. The Lords found, That the witnesses had such credible information the subscriber was the true person, that they might lawfully sign as witnesses. Here there was no doubt but that it was the deed of the party herself, Dalrymple, 8th June 1716, Walker *contra* Representatives of Adamson.

THE Lords found a bond null, because one of the witnesses deponed, That he did not see the party subscribe the bond. Home, November 1682, Stevenson *contra* Stevenson. Fountainhall, 12th February 1684, Blair *contra* Peddie. --- A witness after 10 or 12 years, having acknowledged his subscription, but not remembering that he saw the parties subscribe, or heard them own that they had subscribed; but declaring, That he knew their subscriptions, and was sure he would not have subscribed witness, except in the presence of the parties; this the Lords found probative, notwithstanding the act of parl. 1681, requiring witnesses to see the parties subscribe, or acknowledge their subscriptions, which doth not import that a witness, after a tract of years, can distinctly remember the thing. Forbes, 23d November 1708, Sim *contra* Donaldson.

Designation
of the wit-
nesses.

THE act 1579, cap. 80, requires that witnesses adhibited to the subscription of notaries for parties be specially designed; and therefore tho' the two notaries subscribed before four witnesses, whereof two were designed in the precise terms of the act, the other two were not designed, but their subscriptions were adhibited to the writ, which was alledged to be equivalent; the Lords, notwithstanding, found the writ null. Durie, 8th July 1623, Sheriff of Cavers *contra* Henderson. --- But it is sufficient the witnesses be designed any where, tho' not in the body of the writ, which the act does not require. Marcus, (*Subscription*) 17th January 1682, Deuar *contra* Beatson.

A BOND being subscribed by the party himself before two witnesses also subscribing, the bond was sustained, tho' the witnesses were

were not designed, and not so much as mentioned in the body of the writ, because the aforesaid act relates only to witnesses adhibited to the subscription of notaries, when the party himself cannot write; and the act 1540, *cap.* 117, which requires that parties subscribe before witnesses, provides not that the witnesses be designed, or so much as mentioned in the writ. Durie, 3d July 1634, *Home contra Home*.---- Upon this footing it is, That when the witnesses are not designed, or perhaps not mentioned at all, which of course lays the writ open to the objection of not being subscribed by the party before witnesses, the use is to allow the pursuer to condescend upon the witnesses, which was found with respect to a writ before act 1681, tho' the witnesses were not so much as named in the body of the writ. Forbes, 21st July 1711, *Ogilvie contra Baillie*.---- The like. Durie, 22d January 1635, *Bell contra Ld. Mow*. N. B. The contrary had been found, *viz.* That it was not relevant to condescend upon witnesses, where it was taken for granted, that the act 117, parl. 1540, requires the witnesses to be condescended on in the deed. Durie, 17th June 1625, *Ld. Kinaldie contra Kaldie*. Auchinleck, (*Acquittance*) 28th June 1631, *Ferguson contra Campbell*.---- But in such a case it was found, That he must condescend upon living witnesses, or otherwise produce other adminicles to astrue the verity of the subscription; for, if a condescendence upon dead witnesses were held sufficient, this would entirely take off the check, and be the same with no condescendence at all. Stair, 3d February 1665, *Falconer contra Earl of Kinghorn*.---It being objected against a bond, granted before act 1681, That it was null as to one of the cautioners, having neither date nor witnesses to his subscription; and being offered to be proved, that this cautioner sign'd the same day, and before the same witnesses with the other debtors in the bond; the Lords, before answer, ordained the witnesses to be examined upon this fact. Stair, 24th January 1668, *Magistrates of contra Earl of Findlater*.---- One of the witnesses in an old writ, being not so much as inserted, far less designed in the body of the writ, and the pursuer offering to condescend on the person, the writ being long prior to the act of parliament 1681; the Lords, nevertheless found the writ null and unsupplyable, now after a climaterick of 63 years, all the parties also being dead. Fountainhall, Forbes, 5th December 1707, *Bell contra Campbell*.

It being objected as a nullity against the execution of an inhibition, That the witnesses were not named nor designed in the body of it, but in a marginal note, adjected by the messenger himself, and did not say, (as in probative consensual writs is requisite) that the witnesses were also witnesses to the marginal note, the Lords repelled the objection, for the act 1469, *cap.* 32, requiring executions to be done before witnesses, requires not that the witnesses be named in the execution. Fountainhall, 23d June, Forbes, 5th July 1710, *Lord Gray contra Hope*.

THE act 5, parl. 1681, requires the witnesses be designed in the body of the writ, &c. this clause was found not to extend to the execution of a summons, but only of inhibitions, interdictions, hornings or arrestments. 8th December 1736, *Gabriel Napier contra Lord Elphington*.

Subscription
of the witness.

THE confirmation of an executor creditor found null upon the act 4, parl. 1686, because the execution of the edict wanted subscribing witnesses, tho' it was alledged by the defender, That the statute goes no further, than to introduce the form of subscribing witnesses to executions, in place of the former custom of stamping, and does not relate to edictal citations by the officers of inferior courts, who used not to stamp their executions. Forbes, 24th, Fountainhall, 25th January 1711, *Moir contra Don*.

A TACK signed by the principal parties, but not by the witnesses, being left thus uncomplete in the hands of one of the two persons who were insert as witnesses, he and the other, some days thereafter, put their names to the contract as witnesses, at the instigation of one of the parties; the Lords found the tack null, for the parties having broke up, without perfecting their contract, they were free, and could not afterwards be bound but by a new act of their own, interposing their consent to the subscription of the witnesses. June 1730, *Home contra Dickson*.

What Designation sufficient.

Designation
of the writer.

THE writer of a bond found sufficiently designed by the general designation of notary. Forbes, 27th June 1706, *M'Micken contra Kennedy*.---- The Lords sustained a writ executed in Edinburgh, tho' it bore only written by John Russel writer, which they held a sufficient designation. Forbes, 20th February 1712, *Rules contra Creditors of Riccarton*.---- The Lords sustained (Gentleman) as a good designation of the writer of a paper at Dublin in Ireland, conceived after the Scots form, and relative to a debt in Scotland. Forbes's MS. 27th July 1714, *Murray contra Lady Semple*.---- The docquet of a bond being in these terms, *I have subscribed these presents, written by George Henderson at Auchterhouse the 11th December, &c.* the bond was challenged as null, seeing the writer was not designed. Answered, These words, *At Auchterhouse*, are rather to be understood as the designation of the writer, than the place of subscribing, and *de facto* the writer lived at Auchterhouse; neither is the omission of the place a nullity. The nullity was repelled. Forbes, 15th, Fountainhall, 20th February 1706, *Duncan contra Scrimzeour*.---- A contract of marriage bearing to be written by the said Mr. John Dickson, mentioned in the former part of the contract as the husband, this was found a sufficient designation, tho' Mr. John Dickson the husband was not designed, for it was equivalent to saying, 'Written by Mr. John Dickson, who was married such a day and to such a woman,' a very sufficient designation at least to every party concerned in the contract. Forbes, 22d December 1710, *Dickson contra Logan*.

Of the witnesses.

IN an instrument of intimation of an assignation, one of the witnesses being only designed *Indweller in Edinburgh*, it was found incumbent upon the assignee, being in a competition with an arrester, to make a more particular condescendence. Stair, 21st February 1672, *Bailie contra Somervell*.---- The Lords repelled this reason of reduction of a disposition, granted after the act 1681, That one of the witnesses was not sufficiently designed, being only designed

ed *Indweller in Edinburgh*; but then they thought if the pursuer insisted for it, the defender would be obliged to condescend if the witness was dead or alive, and to distinguish him so as to be known from others of the same name. Here the party's subscription was not deny'd, it was only suspected that the disposition which was granted by a woman was antedated, in order to prejudice the husband of his *jus mariti*. Fountainhall, 29th November 1698, Grant *contra* Keir. ---- Witnesses in a bond being designed thus, (A) *writer bereof*, and (B) *at Leckie*; the Lords found, That these words (*at Leckie*) were the designation of both the witnesses, and so repelled the nullity, and sustained the bond. Fountainhall, Forbes, 14th December 1708, Sheriffs *contra* Jamieson. ---- Witnesses to a bond being designed thus, "Gilbert Elliot inserter of the sum, and Archibald Neilson servitor" to the Laird of Cavers;" the Lords found the bond null, the first witness not being designed, tho' it was urged, That the designation *servitor*, &c. may naturally enough be applied to both, and *de facto* both the witnesses were servants to Cavers at the time. Bruce, 9th November 1714, Halden of Lanerk *contra* Ker of Cavers. ---- A bond granted by principal and cautioner was docquetted thus, *In witness whereof, I (sciz. the principal debtor) have written and subscribed these presents, &c. before these witnesses, &c.* The objection was, That the docquet did not bear that the two witnesses to the subscription of the principal, were also witnesses to the subscription of the cautioner; the Lords, notwithstanding sustained the deed, for they constructed these words in the beginning of the bond, *We bind and oblige us, &c.* so as to connect with the words, *before these witnesses, &c.* Forbes, 14th February 1712, Orr *contra* Wallace of Camisellan.

Other Requisites.

A BOND was sustained wanting a date, having a term of payment. Date.
Durie, 11th December 1621, Hamilton *contra* Sinclair. Stair, 15th January 1662, Grant *contra* Grant. Forbes, 1st, Fountainhall, 2d July 1712, M'ildoune *contra* Graham. ---- A declaration sustained, tho' wanting a date. Forbes, 21st July 1711, Ogilvie *contra* Baillie. ---- A bond wanting a date, it was referred to the defender's oath that he subscribed the same; the Lords found this relevant to support the bond, with this provision, That the defender might add to his oath what quality he thought fit. Which looks as if the bond was considered to be simply null. Stair, 7th June 1666, Crawford *contra* Duncan.

THE Lords refused to find a writ null, upon this ground, That it mentioned not the place where it was granted. Place.
Forbes, 14th July 1709, Vallange *contra* M'Dowal, Forbes, 21st July 1711, Ogilvie *contra* Baillie.

IN a question, if submissions fall under the stamp-act, it was urged, Stamp.
That a decreet-arbitral needs not be stamped, being *quasi* a judicial act; but a submission is a contract, and ought to be stamped as much as any other contract; the Lords found, That submissions are comprehended under the act. 1st January 1726, Crawford *contra* Wishart.

Solemnities of Deeds wrote book-ways.

It was objected against a *fasine*, That the witnesses did not sign every leaf, as required by act 17, parl. 1686; it was answered, That the act was repealed by act 15, parl. 1696, by which it is sufficient that witnesses sign the last page. Replied, It neither was nor ought to have been repealed, parties subscriptions are a check in securities wrote book-ways, that no new sheets be put in; but in *fasines*, where the witnesses subscribe not every page, there is no safety against the notary, who may alter and innovate *fasines* at pleasure. Duplied, The last act is general, statuting with relation to all securities, without limitation, nor is there any good reason for a distinction, a *fasine* beyond its warrant being a very harmless instrument, and it must be registred within a very short time to make it effectual against third parties. The Lords repelled the objection. June 1716, Earl Findlater *contra* Lady Boyne. January 1725, Earl Buchan *contra* Duff. N. B. This was reversed in the house of Peers.

Privileged Writs.

Deeds in *re*
mercatoria.

A LETTER sent to France commissioning wines, not sustained to produce action, unless proved to be holograph. Durie, 14th February 1627, Pynnon *contra* Ramsay's executors. --- But thereafter mis-five letters in *re mercatoria* sustained upon the bare subscription of the party, without being holograph. Durie, Spotiswood, (*Obligation*) 12th July 1632, Ramsay *contra* Pynnon. --- A commission from one merchant to another sustained, tho' subscribed only by initials without witnesses. Stair, Gosford, 11th January 1676, Thomson *contra* Crichton. --- A tripartite contract in *re mercatoria*, subscribed by the three parties, was sustained, tho' wanting both writer's name and witnesses. Stair, 19th July 1676, Forrest *contra* Veitch.

The Lords found, That without regard to the act of parliament 1681, custom must be the rule in protests of bills of exchange, as well as in the bills themselves, and therefore a protest was sustained, tho' the witnesses were neither designed nor subscribing. Fountainhall, 21st July 1697, Inglis *contra* Clark.

Subscribed
accomp'ts.

A TICKET for a sum of money confessed owing for furnishing, subscribed by the party, will be sustained, altho' it want date and witnesses, if the particular accomp'ts be extant to which the ticket refers. Haddington, 9th January 1611, Simpson *contra* Lord Torthorrel. --- A subscribed accomp't of furnishing, tho' without witnesses, sustained. Haddington, 6th March 1611, Arnot *contra* Countess of Orkney. Gosford, 25th July 1676, Campbell *contra* Ld. Abden. --- A debtor's naked subscription to an accomp't of debursments found probative, seeing he did not offer to deny the subscription of the said accomp't to be his hand-writ. Durie, 11th January 1628, Rule *contra* Ld. Ayton. --- The simple subscription of the debtor, to accomp'ts furnished to him, were found probative without witnesses against his heir, altho' some articles of the accomp't bore trifling sums of money advanced by the merchant; but the bare subscription was not found sufficient for annualrent,

nualrent, tho' the accompt bore the same. Stair, 2d January 1678, M'Lurg *contra* Earl Dalhousie. — The Lords sustained a person's receipt of victual sold to him, subjoined to an accompt thereof, as probative, tho' wanting writer's name and witnesses. Forbes's MS. 27th January 1714, Leslie *contra* Millers.

DISCHARGES by a master to his tenants sustained against him, tho' neither holograph nor having witnesses. Stair, 4th July 1667, Schaw *contra* Tenants. Dirleton, Stair, 7th November 1674, Boyd *contra* Storie. — The like. Fountainhall, 24th March 1685, Glendinning *contra* Glendinning. — A discharge by a master to his tenant is sufficient, tho' neither holograph nor having witnesses. It is not so where the discharges are granted by an annualrenter to an heretor. Stair, 27th July 1667, Preston *contra* Scot.

FOUND, That the acts of parliament, requiring writer's name and witnesses in probative writs, had no place in a writing betwixt officers of the army concerning their pay, and which upon the matter was a letter of credit; and therefore action was sustained upon it, tho' subscribed only by the party without witnesses. Forbes, 18th January 1712, Montgomery *contra* Marquis of Lothian.

ONE notary is sufficient to a testament, of whatever extent the subjects be. Haddington, 18th January 1623, *contra* . — An assignation signed for a person on death-bed, tho' only by one notary, was sustained, being of a testamentary nature. Colvil, Buchanan *contra* M'Artey. — An assignation made on death-bed of a great sum of money, and signed for the party only by one notary, was found null at the instance of the debtor, altho' it was alledged, That one notary might validly have made his testament for him, and therein have disposed on all his goods. Haddington, 25th January 1610, Wardlaw *contra* Earl Marischal.

THE Lords sustained a testament as a probative writ, altho', *imo*, It did not design the granter, but only said *I undersubscribing*, yet it named his brother and sister universal legatars, and designed them. *2do*, Altho' it did not name an executor, which is *caput & fundamentum testamenti*. *3tio*, Tho' it did not bear who was the writer; and this because it was done among soldiers, and in New Edinburgh in Caledonia, where there was not *copia peritorum* to be had. Fountainhall, 1st January 1708, Ker *contra* Hay. — A testament made by a Captain of one of the Darien ships, labouring under the following nullities, *viz.* *1mo*, It wanted the writer's name. *2do*, No witnesses at it. *3tio*, It wanted date and place. Yet the Lords finding no other testament in competition, sustained the testament, it being always proved to be holograph. Fountainhall, Forbes, 20th January 1709, Pennycuik *contra* Scot.

A TESTAMENT all written with the testator's hand, tho' wanting date and witnesses, and not subscribed, yet found sufficient to make the testator's brother his executor. Haddington, 5th December 1610, *contra* .

Decreet-ar-
bitral not
privileged.

A DECREET-ARBITRAL is not a privileged writ, and therefore was found null, wanting witnesses. Fountainhall, 28th July 1708, *Ld. Pitcur contra Ld. Millhall*.

Nor missive
letters.

A TACK of teinds being set to the heretor, with this condition, That if he did sell the lands, the tack should be void, and the heretor having sold the lands, and the titular assigned the contract to a third party, who insisted upon the irritancy, a missive letter produced under the titular's hand, bearing his consent to the alienation of the land, was sustained, tho' without witnesses, as a good proof of his consent, even against the assignee, until the same were challenged in an improbation. *Durie*, 12th February 1629, *Lord Leslie contra Ld. Boquhen*. — It being libelled, That an *L. 100* was sent to the defender to buy furniture, and that most of the sum was not bestowed, and therefore craving repetition; a missive letter, tho' not holograph, was sustained as a sufficient instruction thereof. *Stair*, 28th February 1671, *Earl Northesk contra Viscount of Stormont*. — A party, who was sued upon his bond, producing a missive letter, not holograph, containing a discharge of the bond, with an apology why he sent not the bond, not being then in his hands, and promising to send it to him; the Lords found, That the letter not being holograph, could not instruct payment of this bond, not being *in re mercatoria*, nor betwixt strangers; but a bond of borrowed money betwixt gentlemen. *Forbes*, 22d December 1710, *Fountainhall*, 11th January 1711, *Gordon contra M'Intosh*. — It was found, That a letter, not being holograph, was not sufficient to infer an obligation upon the subscriber, tho' it related to the tocher of a married child, and was insisted upon as coming in place of a contract of marriage, which is favourable. 22d February 1728, *Strachan contra Farquharson*.

It was found no objection against a promise, contained in the postscript of a holograph letter, that the postscript was not subscribed; because, in other cases, the want of subscription argues that the writ it left is imperfect, the parties having changed their mind, which holds not in the postscript of a letter, seeing the letter was sent. *Stair*, *Gilmour*, 15th July 1662, *Wauchop contra Ld. Niddry*. — The like. *Bruce*, 10th July 1717, *Paterfon contra Inglis*.

Nor con-
tracts of mar-
riage.

A CONTRACT of marriage is not a privileged writ, therefore there being cautioners in a contract of marriage, for payment of the jointure, the contract was found null as to them, because subscribed only by one notary, tho' the subsequent marriage did homologate the contract, so as to bind the principal parties. *Durie*, 30th June 1625, *contra*. *Gilmour*, 15th December 1664, *Campbell contra Campbell*. *Newbyth*, 23d December 1667, *Campbell contra M'Allan*. — A contract of marriage, bearing date since 1681, in which the witnesses were not designed, was found null, tho' marriage had followed upon it; and the defect was not allowed to be supplied by a condescendence of the designations. February 1728, *Duke of Montrose contra Graham*.

Peculiarities anent the subscribing mutual Contracts and
Decrets-arbitral.

WHERE a mutual contract is contained in one paper, the subscription of both parties is necessary, but if executed by two counterparts, it is sufficient if each subscribe the paper containing what is prestable upon himself; upon this footing there being two doubles of a contract, a marginal note signed but by one of the parties, was sustained, being in favours of the other party. Fountainhall, 17th June 1701, Smith *contra* Gordon.

THREE doubles of a writ being drawn, it was found to be no nullity, that in two of them the writer's designation was neglected, the third being formal. Bruce's MS. 3d July 1716, Cubison *contra* Cubison.

A DECRET-ARBITRAL was sustained, altho' the blank on the other side was not subscribed by the parties, but by the arbiters only, seeing the submission was duly subscribed. Durie, 7th March 1633, Beatie *contra* Dundee. Forbes, 12th March 1707, Knox *contra* Home. — Where the blank on the back, in which the decret-arbitral was afterwards filled up, was duly subscribed for the parties by two notaries and four witnesses, the decret-arbitral was sustained, tho' in the submission, there were only three witnesses adhibited to the subscription of the notaries. Durie, 26th January 1625, Fairlies *contra* Johnston.

THE Lords sustained this reason of reduction relevant to reduce a decret-arbitral, That the blank on the back of the submission was subscribed by the arbiters at the same time that the submission was subscribed, and not after inserting the decret-arbitral; and they found the alledgeance proved by the docquet of the submission, in the following words, "And the parties and arbiters in token of their acceptance have subscribed these presents, with the blank on the back thereof, the said 7th January, &c." Forbes, 1st January 1706, Row *contra* Row. — In a cause depending before the privy council, a committee of their number being delegated to examine witnesses, and the cause being submitted to this committee, a decret-arbitral, not signed by the plurality, but only by him who was chosen preses of the meeting, while they acted as a committee, was found null. Forbes, 7th July 1708, Paton *contra* Leith.

Delivery in what Cases necessary?

A FATHER having disposed his estate to his eldest son, with warranty, did, thereafter, deliver certain bonds of provision to his other children; it was found, That these bonds of provision, tho' prior in date to the son's right, yet posterior in delivery, could not affect the intervening fee. Dirleton, 9th, Stair, 10th January 1668, Ld. Glen-corfe *contra* his brother and sisters. — A bond being subscribed by a debtor and most of the cautioners, and delivered to the creditor to be given to another of the cautioners to subscribe, which he having done; and being pursued in an exhibition, it was found, That he might lawfully

Monolateral
deeds *inter vi-*
vos not effec-
tual without
delivery.

fully cancel and take his own name therefrom, since he had never delivered it to the creditor, after subscribing; but that he behoved to give it up to the creditor in the same state as he got it, with respect to the other party's subscriptions. Durie, 5th March 1628, M'Gill *contra* Edmondston. — The like. Durie, 24th July 1634, Glendinning *contra* Wyllie. — In order to defeat an arrestment, it being alledged, That the common debtor had discharged the debt, before the date of the arrestment; it was found, That the discharge could operate nothing, unless delivered to the debtor himself, or some other for his behoof, before the arrestment. Stair, 13th December 1661, Boyd *contra* Ld. Niddery. — An obligation to dispoise lands, being put into a writer's hand, in order to form a charter thereupon, found, That the purchaser could not have exhibition of the bond, or oblige the seller to implement, unless he could subsume, that the bond was given to the writer for his, the purchaser's behoof, in order to be delivered up to him. Durie, Hope, (*Alienation*) 16th December 1626, Byres *contra* Johnston. — A Lady having judicially ratified an assignation to part of her jointure, but still having kept the assignation in her own custody; the Lords found the alledgeance of not delivery relevant to free her from the assignation, and that it was not elided by the judicial ratification. Home, January 1685, Lady Bathgate *contra* Cochran.

Deed in fa-
vours of a wife.

A CHARTER granted by a husband to his wife, found sufficient to defend her against the heir, tho' no sasine had followed upon it; but it was also found relevant for eliding the same, to prove by her oath, That the charter had never been delivered to her by her husband, but had been taken out by her from his writs, after his decease, altho' it was not alledged, that the same had been revoked or altered by her husband in his lifetime. Durie, 14th December 1627, Dickson *contra* Dickson. --- A postnuptial bond for a liferent-provision, executed by a husband in favours of his wife, which is not revocable as *donatio inter virum & uxorem*, found lying by the defunct at his death, was sustained, tho' the granter altered and recalled the same by a writ under his hand, because such a deed is effectual from its date, as if it had been delivered; in respect a deed by a husband in favours of his wife admits not of delivery, he being in law the custodiar of his wife's writings. Bruce, 18th February 1715, Lord Lindores *contra* Stewart.

Mutual con-
tract good
without deli-
very.

A MUTUAL contract becomes an effectual deed upon the subscription of the parties, and requires not delivery to complete it. Durie, 29th June 1625, Crawford *contra* Vallance's heirs. Durie, 23d June 1626, Maxwell *contra* Ld. Drumlanrig.

Deed not to
be effectual
till death, good
without deli-
very.

A RIGHT *inter vivos* was found to be good without delivery, the granter's liferent being therein reserved, with a power to dispose of the right itself during his life. Stair, Gosford, 19th June 1668, Hadden *contra* Shoreswood. --- A disposition bearing a reservation of the dispooner's liferent, with power to alter, was found effectual without delivery, or a clause dispensing therewith. Stair, Fountainhall, 11th December 1679, Stark *contra* Kincaid.

A BOND of provision in favours of children, lying by the father the time of his decease, sustained without delivery, tho' dated 25 years before. Durie, 11th November 1624, Children of Wallace of Ederstlie
contra

contra their eldest brother.--A bond executed by a father, obliging himself to infeft a younger son in certain lands, and lying by the granter the time of his decease, found effectual. Durie, 20th February 1639, Lord Cardross *contra* Earl Mar. ---- A disposition of tailzie latent and uncomplete, lying by the maker at his death, was found effectual, tho' neither delivered, nor containing a clause dispensing with the not-delivery. Stair, 26th July 1677, Stevenson *contra* Stevenson. ---- The Lords sustained an assignation as valid, made by a father to his son forinfamiliated, tho' never delivered. Forbes, 16th December 1712, Monro *contra* Monro. --- Assignation of a bond by a father to his bastard son, lying by him at his death, found good without delivery. Stair, 25th February 1663, Aitkenhead *contra* Aitkenhead. --- A woman after making her testament, having executed an assignation of a bond of a 1000 merks in favours of her brother's relict in liferent, and the children in fee; this bond and assignation, lying by her at her death, was found effectual without delivery. Fountainhall, 1st January 1706, Trotter *contra* Pitcairn.

A DECLARATION under the defunct's hand, bearing a former disposition, which he had granted with a power of alteration, to be null and void, and ordaining the heirs of line to succeed, was found effectual without delivery. Stair, 6th January 1680, M'Bride *contra* Bryson.

A FATHER having made a tailzie, dispensing with the not-delivery, and thereafter having made several other deeds relative to the first, and altering the same in some particulars; but not containing a clause dispensing with the not-delivery; the Lords ordained all these writs to be given up to the heir of tailzie, being lying by the defunct at his death; the first disposition of tailzie, in respect of the dispensing clause, and the rest, as being accessory thereto. Stair, 23d July 1669, Ellies *contra* Englishtown. --- One having granted a disposition of some goods, without an onerous cause, containing warrandice from fact and deed, and dispensing with the not-delivery, and thereafter having disposed some of the same goods to another; in a competition it was alledged for the first disponent, That the disponent could not take away his *jus quæsitum*. Answered, The first disposition was never delivered, and the clause, dispensing with the not-delivery, could not hinder the disponent to alter or innovate at his pleasure, all the use of the dispensing clause being only to hinder heirs or executors to quarrel the deed for want of delivery; the Lords preferred the second disposition. Marcus, (Alienation) March 1683, *contra*.

AN heretable bond by one to his nephew found effectual, tho' never delivered, saine having been given thereupon, which was in the publick register, whereby there was *jus quæsitum* to the nephew. Stair, Dirleton, 23d June 1675, Bruce *contra* Bruce. Registration equivalent to delivery.

Writs defective in Solemnities, if capable of Support, so as to furnish Action.

THE act 179, parl. 1593, statutes, " That all writs and evidents shall make special mention in the end thereof, before inserting the witnesses, of the name and designation of the writer, otherwise the
VOL. II. 6 Z Deed before 1681, wanting the writer's name, or same designation.

"same to make no faith in judgment or out-with." It is not extremely clear what is intended here, whether that the omission of the writer's name and designation should make the deed *ipso jure* null, so as to deny action upon it, or if it should only furnish an exception to the defender; if the first, the writ is no better than blank paper, and consequently not capable of support by homologation or otherwise; if the last, the exception must resolve into this, That the deed is not a full legal proof, which of course leads the pursuer to support the deed by making a proof who was the writer, or by alledging that the defender has acknowledged the deed and homologated the same, which must bar him from making any objection to its veracity. Our judges have interpreted the act in the last sense; and therefore, in a question upon this act, the omission of the designation of the writer was allowed to be supplied by condescending upon the same. Spotiswood, (*Writs*) 12th March 1628, Dishington *contra* Scot. Stair, 5th December 1665, Cuningham *contra* Duke Hamilton. --- The user of a discharge null for want of the designation of the writer, was allowed to supply the same, by condescending upon the writer, if alive, or, if dead, by producing several of his manuscripts to be compared with the hand-writ of this discharge. Stair, Dirleton, 22d February 1676, Ld. Innes *contra* Gordon. --- A minute of a contract, wanting the date and the writer's designation, was sustained as a contract of marriage, the marriage having followed, and the pursuer condescending, that it was the hand-writ of her husband. Durie, 18th January 1637, Wolf *contra* Scot. --- The writer of a bond before 1681, being designed servant to one not designed, a condescendence upon the designation of that undesigned person, ascribed by an assignation from the creditor in the bond, wherein one of that name was so designed, was, by the Lords, sustained sufficient to supply the defect. Forbes, 28th January 1713, Scot Lady Hackshaw *contra* Dutche's Buccleugh. --- In like manner the defect of a bond which wanted the writer's name altogether, was allowed to be supplied by a condescendence upon the writer, and a proof that he wrote the bond. Forbes, 2d, Fountainhall, 25th, February 1710, Sharp of Hoddam *contra* Earl of Nithsdale.

Deed before
1681, wanting
the witnesses
names or their
designations.

IT was objected as a nullity to a bond of thirlage, That tho' subscribed by two notaries and four witnesses, one of the witnesses is not designed, or so much as inserted in the body of the writ; the Lords found the bond null upon the act 80, parl. 1579, and that the defect was not suppliable by condescending on the designation of the witness tho' the certification of this act is not more express than of the act 1593, being almost in the same words. 25th January 1738, Low *contra* Beatson.

Deed after
1681, wanting
the names or
designation of
the writer or
witnesses.

BY act 5, parl. 1681, it is enacted, "That all writs subscribed by any party, wherein the writer and witnesses are not designed, shall be null, and not suppliable by condescending upon the writer, or the designation of the writer and witnesses;" upon this clause a bond was found null, which wanted the name of the writer, tho' a most pregnant proof was offered, that a person condescended on wrote the bond, and who was also produced in court to depone upon the fact. Fountainhall, 21st November 1704, Kirkpatrick *contra* Ferguson. --- In the like manner an obligation bearing date since the act 1681, was found

found null for want of the writer's designation, and not suppliable by offering to prove by oath of the granter's heir, that it was truly subscribed by his predecessor, and never satisfied. Forbes, 4th January 1710, Logie *contra* Ferguson. --- One of the subscribing witnesses in a bond, since the 1681, being, by mistake, named in the writ by another christian name than his own, the bond was found null, and not suppliable, because, strictly speaking, the witness was not so much as named in the bond. Fountainhall, Dalrymple, Forbes, 15th July 1707, Abercrombie *contra* Innes.

BUT a bond since 1681, of which the debtor had paid a part, was sustained, tho' the designation of one of the witnesses was wanting, which must be upon this footing, That the nullity mentioned in the act is not a total nullity to bar action, but only such as to furnish the defender with an exception, which he may renounce, either by express consent, or by consent implied in acts of homologation. Bruce, 17th February 1715, Sinclair of Freswick *contra* Sir James Sinclair of Dunbeth.

A DECRET-ARBITRAL being challenged in a reduction, because the submission on which it proceeded was null by act 1681, there being only one witness to the subscription of one of the parties; the defence was, That the submission was homologated by the parties appearing and pleading before the arbiters. Answered, This may give it the effect of a verbal submission, which by law is reducible upon iniquity, but cannot make a null writ valid. Replied, A writ tho' defective upon the act 1681, is not *ipso jure* null; it has an effect in law as being sufficient to found a process; 'tis elidable indeed by exception, but if the party do not chuse to move his exception, it is not *pars judicis* to take notice of it; and the acts of homologation mentioned, are sufficient to bar the party *personali objectione* from moving his exception; the Lords sustained the defence of homologation. 21st January 1735, Tailfer *contra* Hamilton of Grange. --- A minute being null for want of witnesses, was nevertheless sustained, as having been homologated by the party, in so far as he received an assignation appointed in the minute to be made to him by the other party, and comprised thereon. Nicolson, (*Homologation*) 12th July 1620, Gordon *contra* Lyle.

Deed wanting witnesses.

A TICKET neither holograph nor having witnesses, cannot be sustained by referring to the defender's oath that the subscription is his hand-writ, because the obligation being null is not suppliable by any sort of proof, and therefore the verity of the debt must be *simpliciter* referred to the defender's oath, and that it is still resting owing; which was the rather found, that the obligation was 25 years old, and the money never demanded before. Durie, 14th February 1633, Rankin *contra* Williamson. --- In the like case the Lords found, That the defender might adject what quality he thought fit, and was not bound to depone *simpliciter* upon the verity of the subscription. Durie, 11th February 1634, Cassimbro *contra* Irvine. --- A ticket from one brother to another, bearing, *That he should pay the half of the expenses of the reparation of a certain house*, found null, as not being holograph, and without witnesses; and the offer was not found relevant to prove the verity of the subscription by witnesses, or *comparatione literarum*, tho' being betwixt two brethren *in re modica*, not much exceeding L. 100. Stair, 5th December 1671, Dickson *contra* Dickson.

fon. ---- In a pursuit upon the passive titles for payment of a bond, objected, There is but one witness to the bond. In order to support the bond a proof being admitted, other writs were produced of the debtor's hand-writing, and one witness deponed that the subscription was his; the Lords found these not sufficient to support the bond. Stair, 4th January 1668, Dow *contra* Campbell.

THE act 5th, parl. 1681, which declares, That writs shall be null unless the witnesses be designed, goes upon the supposition, that there must be two witnesses, and as the want of the designation of the witnesses is not suppliable by a condescence, far less will a proof be admitted that there were *de facto* witnesses, when none are named in the deed. But as these nullities amount not to a *denegatio actionis*, but resolve into an exception; the act does not say, that the subscriber of the writ may not be barred from his exception by homologation; and if by homologation, which is but an implied acknowledgment of the verity of the deed, *multo magis* by a direct acknowledgment upon oath; and therefore a contract null upon this act, as being subscribed only by one witness, was found suppliable by referring the verity of the subscription to the party's oath. Fountainhall, 26th December 1695, Beatie *contra* Lambie. ---- But where there are no witnesses at all, the objection amounts to a *denegatio actionis*, and which therefore does not admit of being supplied, as was found in the case of a missive letter wanting witnesses altogether. Forbes, 22d December 1710, Fountainhall, 11th January 1711, Gordon *contra* M'Intosh. ---- Four persons signed an order or commission to a shipmaster in Leith, for building a ship of 50 tuns burden, to be delivered to them for their respective interests; the ship was accordingly built, and every one paid his moiety except Balfour, whose defence was, That the order or commission was null by the act 1681, as wanting witnesses. Answered, *imo*, The defender does not pretend to deny his subscription, and that is sufficient to bind him to all the terms and conditions expressed in the writ. 2do, The defender is removed *personali objectione* from pleading the nullity, who saw the pursuer laying out his stock and labour upon his account in pursuance of the commission, after which it would argue the greatest turpitude if he should refuse to perform his part of the bargain. The Lords found the defender liable. July 1716, Henderson *contra* Balfour.

Wanting a clause, bearing command to the notary to sign for the party.

A DEED being subscribed by notaries, because the party could not write, was found null, because the notaries subscription did not bear, that it was by command of the party; nor was it found suppliable by a proof of witnesses that the command was actually given, because even in ordinary cases order or command is not so probable. Stair, 26th July 1667, Philip *contra* Cheap.

Where notaries have not signed *unico contextu*.

A TACK null, as signed by two notaries upon different days, and not *unico contextu*, was found homologated by the tacksmen's entering into possession. Durie, 23d January 1624, M'Moran *contra* Black. ---- The like, with regard to an infestment of annualrent, in virtue of which the creditor had been in possession of the lands for many years. Durie, 20th, Spotiswood, (*Contract*) 21st March 1633, Cow *contra* Craig.

A BOND

A BOND subscribed by two notaries before three witnesses only, was found homologated and unquarrelable, by payment of annualrent for several years. Nicolson, (*Annualrent*) 20th November 1627, Lockie *contra* .---- A decret-arbitral being quarrelled, that being in a matter of importance, the submission was signed only by one notary ; the Lords sustained a receipt of 1200 merks, paid in consequence thereof, as a sufficient homologation : For tho' the receipt laboured under the same defect, yet it was still good as to *L. 100 Scots*. Fountainhall, 23d November 1699, Grierison and Mackie *contra* Scot. ----

Deeds of importance having but one notary.

An assignation null, as being signed only by one notary, was found to be good against the cedent, who homologated the same, by granting a discharge relative thereto. Haddington, 7th March 1612, Boswell *contra* Kinninmouth. ---- A contract of marriage subscribed only by one notary before witnesses, is not quarrellable upon that head, either by the husband or wife or their representatives, provided marriage have followed upon it, because the marriage is an act of homologation, which bars them from making the objection. Spotiswood, (*Marriage*) 6th July 1626, Cheap *contra* Mowat. Durie, 10th December 1630, Nisbet *contra* Newlands. Stair, 1st July 1662, Bready *contra* Bready.

A DISCHARGE null subscribed only by one notary, may be supported by the offer to refer to the creditor's oath the verity of his command to the notary to subscribe for him. Haddington, 22d June 1611, Ld. of Redpath *contra* Huntly. ---- An obligation of great importance null, as subscribed only by one notary and three witnesses, may be supplied by the party's oath, if he be in life. Haddington, 29th November 1609, Weir *contra* Moffat. — The like. Durie, 8th July 1623, Sheriff of Cavers *contra* Henderson. — A submission being signed by two notaries, and prorogated by one only, upon the decret's being quarrelled because the prorogation was not subscribed by two, the defect was found suppliable by the party's oath. Colvil, *contra* . ----

A deed of importance being objected to as subscribed for the party but by one notary before four witnesses, and it being referred to the party's oath that he gave command to the notary, he acknowledged the fact, but insisted that the contract was not in the terms agreed to by him ; upon this it was pleaded for the party, That a deed null for want of solemnities required by law, cannot be supplied by the party's oath, so as to make a *literarum obligatio*. Answered, *imo*, Deeds null for want of legal solemnities are capable of homologation, and therefore may be supported by oath. *2do*, Whatever may be thought with regard to the solemnities of the act 1681, that these cannot be supplied by homologation or oath, the present case is different ; two notaries are required in deeds of importance, as a more firm evidence of the party's consent, not in way of solemnity, and the party's own acknowledgment of his consent, is in all views a stronger evidence than that of two notaries. The Lords sustained the contract. 4th July 1739, Corbie *contra* Sheill.

ONE having bound himself in the marriage-contract of his wife's sister to give with her 200 merks of tocher, and the contract being quarrelled by his heir, as being signed only by one notary and two witnesses, the Lords repelled the objection, the marriage having followed, and there being two decreets standing upon the contract, first a decret of registration against the obligant himself, and thereafter a decret of

transference against the heir, who had now suspended the same. Durie, Spotiswood, (*Marriage*) 11th March 1628, Muir *contra* Crawford.

Bill defective
in solemnities.

A BILL of exchange null as bearing annualrent and penalty, was found not homologated even by a posterior payment of part of the principal sum; for if it was not good as a bill, it could be considered as nothing but a note neither holograph nor having witnesses, which in our law cannot so much as furnish an action. February 1730, Chatto *contra* Davidson. --- The direct contrary was found. February 1733, Brown *contra* Irvine of Wisebie.

Penalty of falsifying Writs.

A BOND being antedated in order to save it from an inhibition, was found null *in totum*, and the Lords *in pœnam falsi* refused even to sustain it, as granted of its true date after inhibition. Durie, 10th February 1636, Edmondston *contra* Sym. --- A bond being produced vitiated in the sum by a superinduction of pounds for merks, was refused to be sustained for the original sum, but found null *in totum*. 26th November 1723, M'Douall of Garthland *contra* Representatives of Kennedy of Glenour. --- A marginal note being proved to be of a false date, this was found to annul the marginal note only, because the brocard, *falsum in uno falsum in omnibus*, holds only *in articulis connexis*. Marcus, (*Improbation*) February 1688, Johnston *contra* Johnston. --- In an improbation of a precept of sasine it being found rased and falsified in the name of a room, was only declared false as to that point, and sustained for the remanent; because, one of the parties whom it concerned *non erat particeps falsitatis & doli*. Haddington, 27th June 1597, Ld. Keir *contra* Ld. Pardivie.

WRIT how far probative? See Probation.

VITIATE writs how far probative? Ibid.

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BLANKS when presumed filled up? See Presumption.

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WRONGOUS

WRONGOUS IMPRISONMENT.

A MAN being charged and imprisoned by an assigney to a contract which had been implemented to the cedent, and pursuing the cedent for wrongous imprisonment, damages, &c. the Lords refused action, because he had not suspended. Fountainhall, 17th July 1678, Durkie *contra* Cairns. Action upon it at common law.

AN episcopal minister, who had been deposed by the present church judicatories, being apprehended by the bailie of a burgh while he was preaching there, and imprisoned on that account, altho' he had taken the publick oaths, did insist for the penalty of the new act of parliament touching wrongous imprisonment; the Lords found, That there was no necessity of a written information in this case, seeing the bailie himself came along to the place where the minister was contraveening an act of parliament, and the act of his own deprivation; and found, That being under church-censure, he was in the exception of the aforesaid act 1701; and further found, That a subscribed bond of cautionry, not being offered (tho' sufficient cautioners appeared and offered themselves bail for him) the bailie committed no fault in refusing to set him at liberty; and therefore assolizied from the process. Fountainhall, 5th January 1704, Peacock *contra* Allan.--- A party by bill insisting upon the penalty of the act of parl. 1701, because one had imprisoned him for a debt, tho' it was paid by intromission with his rents; the Lords found, That he could claim no such privilege, the act relating only to imprisonment for crimes, but thought, That even in the case of debts, the party had an action for damages by the common law, before the act 1701 was made. Fountainhall, 10th February 1705, Gordon *contra* Hope.--- Which action was sustained that very day. Robertson *contra* Pedifon. Upon the statute 1701.

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(a)

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A

Advocate.

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P. 213. at the beginning of Parag. 2. r. An heretable bond upon which infestment had not past, being alienated upon death-bed, did extend to this case, where there was no infestment: seeing our antient Law-books talk only of *Terræ & Tenementa*. The plurality found that this case fell under the law of death-bed, Colvil, 16th January 1581, Dickson contra P. 235. L. 25. for *was*, r. *were*. P. 254. L. 27 after *Raploch*, r. *The like*, tho' the denunciation was executed at the head burgh of the shire. Stair, 19th June 1674, Murray contra Arnot. P. 261. L. 40, after *escheat*, r. By act 268th Parl. 1597 Letters of horning, &c. against persons living within a regality or stuartry, must be executed at the mercat-cross of the regality or stuartry, under certification of nullity: Yet in a general declarator of liferent-escheat, it being objected, That the denunciation was at the mercat-cross of the shire, tho' the debtor dwelt, and his lands lay within the regality of Torphichen; and it being answered, That within the memory of man, no denunciation had been at the mercat-cross of the regality: The Lords sustained the answer, unless the defender would prove, that there was a publick office, and clerk of regality to keep the records of hornings, &c. Gosford, 11th, Stair, 12th January 1672 Scot contra Boyd. — The like. Spotswood (Horning) Stirling contra Abernethy. Stair, 19th June 1674, Murray contra Arnot. — In a similar case, the Lords distinguished betwixt lands lying locally within a regality, and lands lying at a distance, made part of a regality by annexation; and found that tho' there was a publick office and clerk of regality, yet with regard to annexed lands, there was a necessity to denounce there, unless such had been the use and wont. L. 41. after *Dirlton*, r. *Stair*. P. 262. L. 8 after *Heriot*, dele the next decilion. P. 383. L. 10. after *term*, dele *of*.

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PAge 18. at the beginning of Parag. 2. under PACTUM DE NON PETENDO, read *A creditor in assigning a bond*. Line 3. said Parag. for *creditor*, read *assigney*. P. 26. L. 31. for *in seats*, r. *seats in*. P. 54. L. 23. after *thereto*. r. The tacksmen of a branch of the revenue, having assumed other partners, with this provision, that betwixt and a day certain, the assumed partners should grant bond and caution for their proportions, otherwise to be entitled to no partnership; and further to be liable in L. 50 of penalty: One of the assumed partners, who had failed to grant bond and caution, being sued for his proportion of loss upon the tack, was found to be free upon payment of the penalty. P. 115. Parag. 1. L. 2. after *sums*, dele *Bruce*, 4th February 1715 Borthwick contra Crawford. Do. Parag. L. 15 after *Campbell*, r. And a cautioner in a bond payable after the death of the creditor's spouse, was found not entitled to the benefit. Bruce, 4th February 1715, Borthwick contra Crawford. P. 176. L. 19. for *casual*, r. *consensual*. P. 273. L. 4. for *reprobator*, r. *reprobator*. P. 279. at the head, r. A sum provided to children in a contract of marriage, must be taken up by the children as heirs of provision; and therefore if any of them die before their father, they will transmit nothing to their representatives. Marcus, (Bonds) February 1682, Sir John Clark of Pennycuik contra his sisters. P. 341. L. 5. from the foot, for *wife*, r. *woman*. P. 382. L. 26. after *whole*, r. unless the pursuer would reply, That the defender had intromitted with as much as would satisfy the debt acclaimed. P. 406. Note 1. for *suit in* r. *suit and*.

I A Y



